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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 146.

PULLMAN'S PALACE CAR COMPANY, PLAINTIFF IN ERROR,

vs.

THE METROPOLITAN STREET RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN S. RUNNELLS,
WILLIAM BURRY,
GARDINER LATHROP,
Attorneys for Plaintiff in Error.

Tiernan-Havens Printing Co., Kansas City.

Supreme Court of the United States.

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THE METROPOLITAN STREET RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

STATEMENT OF THE CASE.

This is an action brought by the plaintiff, a manufacturer of cars at Pullman, Illinois, against the defendant, an owner and operator of cable railways in Kansas City, Missouri, to recover $50,000, the purchase price of twenty-five combination cable cars, and $4,219.70 for certain extra items furnished in connection therewith, freight paid and goods supplied.

The cars were made and sold by the plaintiff to the defendant under the following written contract, duly executed by both parties:

"CHICAGO, ILL., June 14th, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.:

Gentlemen:—Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications hereto attached and made a part of this agreement, and *deliver the same f. o. b. Pull-*

man Junction or Kensington, Ill., on or before October 10th, 1887, delays by fires, strikes and unavoidable hindrances excepted, for the sum of two thousand ($2,000) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies. (Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN, General Manager.

Accepted June 27th, 1887.

Metropolitan Street Railway Company,
By KNIGHT & BONTECOU, Chief Engineers." (P. 27.)

The plaintiff's petition declared upon the contract, alleging full compliance therewith on its part, inspection and acceptance of the cars at its works by defendant, subsequent delivery thereof to defendant, and breach of its promise to pay the purchase price.

There were also counts for the extra items (pp. 10-13).

The answer, besides a general denial, contained an affirmative defense, based upon the implied warranty of fitness upon the part of plaintiff as the manufacturer of the cars, in which it was alleged that the provision in the contract for inspection and acceptance at the Company's works was afterwards modified and changed by mutual consent of parties and for a consideration, so that the test of the cars was to be made by defendant after delivery at Kansas City and before acceptance, and that the provisions as to acceptance and inspection at the works of plaintiff were abandoned and set aside; that the cars were accordingly tested by defendant upon its Twelfth Street line, at Kansas City, and latent defects found therein in the cars and brake appliances; "that the cars were of too great weight to be operated over the curves and grades upon said line;" that defendant, after inspection, refused to receive or accept the cars, and tendered them back to plaintiff, and, upon its refusal to take them, stored them in a safe place subject to plaintiff's order. The answer also claimed that the extra items were part of the original contract for the construction of the cars, and contained a counter-claim for freight paid, and for damages sustained on account of the defects in the cars (pp. 18-23).

The reply was a general denial (p. 23).

A trial by jury was waived in writing, and the case first submitted to Hon. David J. Brewer, then Circuit Judge, and Hon. John F. Philips, District Judge, but upon Judge Brewer's appointment as an Associate Justice of this Court before the case was decided, it was re-submitted upon the same evidence to Hon. Henry C. Caldwell, Circuit Judge, and Hon. John F. Philips, District Judge. They made the following

SPECIAL FINDING OF FACTS:

1st. The plaintiff for a long time prior to the transactions now in controversy was and has ever since been a corporation extensively engaged, among other things, in the manufacture and construction of cars, including cars for street cable railways, at Pullman, Illinois.

2nd. The defendant for a long time prior to the matters in controversy was and ever since has been a corporation, organized under the laws of the State of Missouri, engaged in the operation of street railway lines, including what is known as cable lines, in Kansas City, Missouri, and Kansas City, Kansas.

3rd. Prior to May 13th, 1887, defendant, preparatory to the operation thereof, was engaged in the construction of a double track railway in Kansas City, Missouri, extending from the eastern city limits a long distance along Twelfth street to Bell street, at the Western limits of the city, and upon said Bell street to the stock yards; thence back on Genesee street to Twelfth and on to the eastern city limits.

4th. The maximum grade of this line is thirteen and fourteen per cent.—that is, thirteen and fourteen feet ascent in a distance of one hundred feet. This grade was five hundred to six hundred feet long. On this line there were a number of grades running up to ten per cent. There were also on the line a number of sharp curves. This line was known as defendant's Twelfth street line.

5th. On May 15th, 1887, the road-bed being constructed and track laid, defendant's chief engineer wrote the following letter to the agent of complainant, to-wit:

"KANSAS CITY, MO., May 13th, 1887.

Mr. Chas. Pullman, Pullman Palace Car Co., Pullman, Ill.:

Dear Sir:—We write to say that we are now ready to talk cars for our Wyandotte and 12th street lines, and should be glad to have you call on us at your convenience. Yours truly,

KNIGHT & BONTECOU,
Chief Engineers."

6th. Pursuant to this letter, Mr. Chas. Pullman, the general agent of plaintiff, came to Kansas City in person for the purpose of discussing the subject-matter of the proposed contract and preliminaries connected therewith.

7th. While in Kansas City, said Pullman was on the ground, and whilst not going over the line of the track, had a general knowledge of

the grades and curves thereof. Thereafter he returned to the city of Chicago, from which place plaintiff sent a letter to the defendant in the following words:

"CHICAGO, June 21st, 1887.

Chas. F. Morse, Esq.,

President Metropolitan Street R'y Co., Kansas City, Mo.:

Dear Sir:—I beg to enclose herewith contract, with specifications attached, executed by me in duplicate, for the building of twenty-five (25) combination closed and open street cars for your Co. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank, and I would be glad if you would indicate on the specifications returned the lettering you desire applied to the cars.

Very respectfully,

GEO. F. BROWN,

2 enclosures." General Manager.

The contract and specifications contained in the foregoing letter are in the words and figures following:

"AGREEMENT.

CHICAGO, ILLS., June 14, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.

Gentlemen:—Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination closed and open cable cars, as per general specifications hereto attached and made a part of this agreement, and deliver the same f. o. b. Pullman Junction or Kensington, Ill., on or before October 10, 1887, delays by fires, strikes and unavoidable hindrances excepted, for the sum of two thousand ($2,000.00) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

(Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,

By GEO. F. BROWN, General Manager.

Accepted June 27, '87.

METROPOLITAN STREET RAILWAY COMPANY,

By KNIGHT & BONTECOU, Chief Engineers.

General Specifications.

For Twenty-five (25) Combination Cars, Lot...., Plan 510, for account of Metropolitan Street R'y Co.

Ground plan—Length 34 feet 9 inches over all; width 6 foot 6 inches or more over sills.

Framing—Height from top of sill to under plate,....

Flooring—Pullman standard.

Style of outside—Number of windows each side, 8.

Roof— do do do end, 2.

Hood—

Window sash, cherry.

Glass, D. T. French. Size...., lower....; upper....

do in clear story, embossed. Size, ...

do in doors, D. T. French. Size...., lower....; upper....

Blinds, cherry frames, basswood slats.

Ceiling, mahogany; decoration,....

Inside finish, same as 16 foot cars recently built.

Seat ends, paneled; malleable handles. Seating capacity, ...

Seats and backs, same as 16 foot cars recently built.

Seat and back springs, ...

do do covering, Wilton plush carpet.

Trimmings, bronze. Basket racks, ...

Lamps, center; 2 in closed part and 1 in open.

do bracket, none.

Water cooler, do

Heater, do

Saloons, do

Locks, do

Body colors, same as 16 foot cars recently built.

Decoration, suitable design.

Lettering, ...

Numbers, from 200 to 224, inclusive.

Names, ...

Platforms, 3 feet 9 inches, per sketch, with one gate on left hand side.

Height from top of rail to center of draw-bar .....

Colors, same as 16 foot cars recently built.

Drawer springs, ...; buffer springs, .. .

Brakes to be operated by gripman with lever, both trucks.

Brake power, ...

Sand boxes to be applied on front truck at center.

Trucks, Pullman standard for cable cars.

Gauge, 4 feet 8½ inches.

Wheel base of truck....; rear truck, 4 feet; front truck, short as possible to admit grip.

Colors, ...

Wheels, Fulton Foundry.

Axles, 3½ inch iron.

Springs, bolster, ...; pilot on front truck.

" equalizer, Vose.

Pedestals—Bemis; wire guards on side.

Oil-boxes "

Oil-box lids "

Brake-shoes—Congdon flange.

Journal bearings—Bemis.

REMARKS.—Extra brakes on rear truck operated by brake-mast, with wheel at rear end platform.

8th. The defendant executed said contract, as shown in the copy, and returned one copy of the same, with a letter as follows:

"KANSAS CITY, MO., June 27th, 1887.

The Pullman Palace Car Co.,

G. F. Brown, General Manager, Chicago, Ills.

Dear Sir:—Your letter of the 21st, enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th-street line, addressed to our President Morse, has been referred to us for attention in his absence, and we enclose you with this one copy, duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the general plans which Mr. Pullman, when here, promised to let us have?

Yours truly,

KNIGHT & BONTECOU,

Chief Engineers."

9th. Between the first and sixteenth of July, 1887, the plaintiff's engineer, Mr. Twyman, visited Kansas City, stating that the general purpose of his visit was to determine upon the general features of the cars, to determine what was the shortest curve and other physical conditions of the road, to determine the radius of the shortest curve it would have to go round, and to arrange with reference to the outside width and the extra length over all, the relative position of the trucks, the height of the wheels, the steps, and the seats, and the distance between the seats, etc. He was at the office of the defendant's engineer for some time and had access to the plans and profiles of the road, and while in Kansas City the following specifications were submitted by defendant's engineer:

"SPECIFICATION.

KANSAS CITY, MO., July 16th, 1887.

Combination cars for Metropolitan Street Railway Co.
Length to be 38 feet over all.
Width, 8 feet, 3 inches over all.
Width of floor frame, 7 feet 3 inches.
Height from top of track to top of floor, 2 feet, 3½ inches.
Distance between centers of trucks, 20 feet, 0 inches.
Wheel base of truck, 4 feet, 8 inches.
Distance from front of car to center of forward truck, 4 feet, 9 inches.
Length of closed part of car, 20 feet inside.
Length of open portion, 8 feet, 9 inches.
Rear platform, 3 feet, 7 inches.
Size of wheels, 22 inches diameter.
16 cross-seats, to be fixed as decided.
Approved July 16th, 1887:

KNIGHT & BONTECOU, Engineers."

10th. Thereafter the plaintiff proceeded with the construction of the cars. The defendant gave no direction in relation to the brakes on the cars otherwise than that they should be extra heavy and extra powerful; nor were any plans or specifications of brakes furnished to the defendant during their construction. The brake put upon these cars was designed and constructed by Mr. Twyman, plaintiff's engineer.

11th. In December, 1887, in response to plaintiff's request that defendant send one of its employees to Pullman to inspect the cars, E. J. Lawless, defendant's superintendent, went there for that purpose. Ten or twelve cars were then shown as completed and standing in the shops of plaintiff, on the floor where they were run out. Said Lawless made a thorough examination of said cars, inside and out, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith, and requested the representative present of the plaintiff to finish the others up in the same way and forward them without more. No further request was made by said Lawless for testing said cars, and no other facilities were offered by the plaintiff for making such test and examination.

12th. The first five cars were shipped by the plaintiff February 24, 1888. The next shipment of eight cars was on March 1st, 1888. The next shipment was of two cars, March 17, 1888. Five cars were shipped March 27th, 1888, and the remainder on the 30th day of March, 1888.

13th. The cars, when they reached Kansas City, were stored in defendant's power house, as the eastern extension of defendant's railroad was not then in readiness for operation. These cars were taken into the house by passing over a curved track from the street. This curve was 30 feet radius. When the first lot of cars were being passed around this curve it was found that the wheels bound against the sills. Thereupon defendant's engineer telegraphed plaintiff as follows: "Forward truck of cars will not pass around 30-foot-radius curve. Lengthen stay-chains and cut away lower corner of middle sills." To which plaintiff answered: "Telegram received. Will make alterations requested."

14th. On the 22nd of March, 1888, before all the cars had been shipped, the east end of the 12th-St. line was completed so a car could run over that part of the line. Defendant's superintendent took out one of the cars for trial, when difficulty about the brakes of the cars manifested itself, which difficulty was this: When the brakes were so adjusted that they could be used to stop the car on a straight, level track, in passing around a curve or up a grade, they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars. On the 23rd day of March, 1888, defendant sent plaintiff the following letter:

"KANSAS CITY, MO., 23 March, 1888.

Geo. F. Brown, Esq., Gen. M'g'r:

Dear Sir:—We tried one of your cars over the line yesterday and found that the brakes would not work satisfactorily; in fact, were perfectly useless: I think the reasons for this are: There being so many connections, and consequently so much lost motion, that before the shoes hug the wheels the brake lever comes to the limit of the quadrant.

Before starting out with the car we adjusted the brake so that the shoes touched the wheels, but notwithstanding this, we could not lock the wheels or even hold the cars on the lightest grades.

As a perfect working brake is an imperative matter with us, I would like to hear from you on the subject, and what remedy you propose.

Yours truly,

EDW. J. LAWLESS."

In response to this letter, Mr. Twyman, plaintiff's engineer, came at once to Kansas City and attempted to remedy the trouble with the brake, and on leaving, claimed he had done so.

15th. On April 5, 1888, the plaintiff sent the following letter to defendant:

"PULLMAN PALACE CAR COMPANY,
GEO. F. BROWN, General Manager.

General Manager's Office,
CHICAGO, April 5th, 1888.

C. F. Morse, Esq.,
President Metropolitan Street Ry. Co., Kansas City, Mo.:

Dear Sir:—The entire lot of 25 cars have been delivered, 18 of them having been shipped in February. Bills have been rendered your company for the amount of $50,000.00, being the original contract price without extras, bills for which will be sent your auditor in a few days.

Will you kindly direct a prompt remittance for the bills already rendered and oblige.

Very respectfully,
GEO. F. BROWN,
General Manager.

Dictated.

And on or about the 7th or 10th day of April 1888, defendant's whole line was ready to be opened when the cars for the first time were placed on the line. This was shortly after Mr. Twyman had left Kansas City. Upon the recurrence of the trouble in operating the cars, defendant's president wrote plaintiff the following letter:

"KANSAS CITY, Mo., April 11th, 1888.

George F. Brown, Esq.,
Gen'l M'g'r Pullman Palace Car Co., Chicago, Ill.

Dear Sir:—I have delayed answering your letter of April 5th for several days, as I wished to see your cars in practical operation before making a reply.

The Twelfth street cable line has been running since Saturday, and we should now be operating with a full equipment if we had not been obliged to make constant repairs and changes to the car brakes.

These are very unsatisfactory, and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes.

I will make no attempt to go into the matter in detail, but wish to say that I shall insist on these cars being made right in this respect before I should be willing to approve your bills.

If you will send a practical man here to take charge of those necessary changes, it will be the best plan, otherwise we shall be obliged to make them and charge you with the expense.

There are some other things about the cars which are not as they should be, but which do not interfere with the operation of them. Many of the panels are badly cracked and the painting on part of the

cars at least is very poorly done. The attention of your engineer was called to these points and he admitted that the work was not as it should be.

I have no desire to delay the settlement of your bills, and would gladly approve vouchers for them to-day if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from you in regard to what action you will take as to the brake repairs at your earliest convenience, and oblige, Yours truly,

C. F. MORSE, President."

To which plaintiff sent the following letter:

"CHICAGO, April 13th, 1888.

C. F. Morse, Esq.,

President Metropolitan Street R'y Co., Kansas City, Mo.

Dear Sir:—Your favor of the 11th inst., received and noted. I regret to hear that you are having any further trouble with the brakes on the combination cars, as our engineer reported on his return that the trial made on the brakes on one of the cars while he was there, after some slight changes had been made, proved entirely satisfactory, and there was every reason to suppose that with these little changes the brakes would work well on the remaining cars.

I regret that your engineer or superintendent did not wire us of the situation as indicated in your letter, as we would have sent our engineer over immediately. As it is, he will leave for Kansas City to-night, and I trust that in conjunction with your people the defects reported can be easily remedied.

Our engineer did report on his return that the paint was acting badly on a portion of the new cars and we are sending out two experienced men to attend to the paint work on such of the cars as require it.

It is proper to explain just here that the defect seems to be with the middle panel, which is painted with what is called 'crimson lake,' and which is one of the most difficult colors to hold.

We regret exceedingly that there has been any trouble in this regard and you may rest assured that the defects will be remedied without expense to your company. Speaking of the paint, reminds me that our people report that the alkali water is very severe on the finish of your cars, as we know from our own experience with sleeping cars where alkali water is used.

Another suggestion in this connection I beg to make is that if your people would take the new cars in shop within about four or five months after they are received and give the paint a thorough cleaning, and then two coats of varnish, they would run for at least a year with

out having to be varnished again, and it would also preserve the life of the paint. Very respectfully,

GEO. F. BROWN,
General Manager."

Immediately thereafter the engineer, Twyman, came to Kansas City to look after the trouble in question, and did some work on the brakes while here, but being called away by letter or telegram, he left for Chicago, stating that he would soon return and complete the work. Instead of so doing he wrote a letter, saying: "I am sorry not to be able to return to Kansas City as quickly as I anticipated. We have, however, arranged to send you a man immediately who will take charge of the necessary alterations on your cars. There will be no necessity for his leaving Kansas City until everything is arranged to your satisfaction, and I will probably come out there again towards the end of the week." Immediately following this letter plaintiff's mechanic, named Overtoom, came, with typewritten instructions from Mr. Twyman, and went to work to remedy the defect in the brakes. He went over the cars one by one, and as he thus went over them pronounced them ready for service. This mechanic stated that he had done all he could do to remedy the difficulty in question, and if it did not accomplish that end, he did not know how to remedy it. Notwithstanding the work and effort of this mechanic, the same difficulty thereafter continued to manifest itself in the operation of the cars as to the working of the brakes. Thereupon defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., May 12th, 1888.

George F. Brown, Esq.,
General Manager Pullman's Palace Car Co., Chicago, Ill.:

Dear Sir:—I have delayed corresponding with you further in regard to the 12th Street cars until your mechanic had finished his work. The result of this work has been very little material improvement in the action of the brakes, and the cars at no time during the progress of the repairs have been in satisfactory condition to operate and are not in such condition now.

This fact has been reported to the board of directors, which has to-day passed a resolution rejecting the 25 cars furnished by your company for 12th street on account of the imperfect brakes and other seriously objectionable features, and have instructed me to notify you to this effect, and that the cars are subject to your order.

I am yours respectfully, C. F. MORSE, President."

To which plaintiff made the following answer:

"PULLMAN'S PALACE CAR COMPANY,
G. F. BROWN, General Manager.

General Manager's Office,
Chicago, May 17th, 1888.

C. F. Morse, Esq.,
Pres't Metropolitan Street R'y Co., Kansas City, Mo.

Dear Sir:—Your letter of the 12th inst., relating to the twenty-five combination cars built by this company for your company, has been received and noted.

Your are cognizant of the fact that the cars were built according to plans approved by your chief engineer; the material used, as well as the workmanship, being first-class in all respects.

The cars, before shipment, were inspected and accepted by your general superintendent. The cars were then shipped to, received, and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car your officers pronounced them satisfactory; thereupon the brakes were in like manner examined and adjusted on the remaining cars, all the cars then being in use by your company.

In view of the facts, your present statement to the effect that you reject the cars on account of the 'imperfect brakes and other seriously objectionable features' is quite astonishing, and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim.

I have to request, therefore, that you will without further delay remit the amount due this company for said cars, as per bills heretofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us.

Very respectfully,
GEO. F. BROWN,
General Manager."

16th. The cars could not be operated successfully on defendant's railroad track for which they were designed with this brake, nor upon similar lines, and this defect or inability in the brake was not apparent nor discoverable upon any reasonable inspection made at the place of their manufacture, and could not be discovered without a practical test on the defendant's railroad track or over like track. The defect in the brake was a latent one which did not and could not develop to the observation on inspection and was only discoverable when put into use on defendant's track or similar track.

17th. The defendant paid the freight and drayage on said cars from Chicago to Kansas City, the sum of $1,088.50, and paid for building house in which to store the rejected cars, $1,850.

18th. After the sending of the letter by defendant's President to the plaintiff informing it that the cars were rejected and were at plaintiff's disposal, the defendant built a car house at or near Kansas City and stored therein these cars, where they have ever since remained.

19th. The defendant operated upon its said road combination cars of a similar character, weighing about six hundred pounds less than the cars in controversy, which were manufactured by the Laclede Car Company of St. Louis, Missouri, and were operated by a brake of different pattern, costing from seventy-five to one hundred dollars apiece.

20th. The defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith.

21st. During the time defendant run the cars on its road, during the tests made, as hereinbefore found, passengers were received thereon and fares collected from them by defendant. The successful running of the trains was frequently interrupted by breaking of the cable and the locking of the car wheels, in consequence of the defective construction of the brakes, and defendant so continued in the attempt to run said cars during the time of plaintiff's promises to repair the alleged defect, and on such trips received on board of said cars passengers and collected from them the customary fare. On the trial defendant offered to prove that, owing to the insufficiency of the brakes, the cars were run at loss and that no profit resulted from collection of fares. On plaintiff's objection this testimony was by the Court excluded.

22d. Defendant had in its employ during the time in question two engineers of skill and experience, one of whom, Mr. Lawless, the same person who went to Chicago to inspect the cars at plaintiff's yards, had experience in the construction and practical operation of cable cars in San Francisco, California, prior to the time of taking service from defendant. (pp. 26-36.)

To the finding of the foregoing facts and each of them, the plaintiff at the time duly excepted. (p. 36.)

FINDING OF FACTS SUMMARIZED.

The controversy between the parties is as to the right of defendant to rescind the contract and reject the cars after inspection and acceptance at the plaintiff's works, and delivery free on board to the railroad carrier, for a defect or "inability" in the brakes which developed when

defendant's line was opened and the cars were put into service, for the carriage of passengers for hire.

The finding of facts upon that issue may be summarized as follows:

After the execution of the written contract, plaintiff proceeded with the construction of the cars. Upon the completion of the first ten or twelve, it called upon defendant to send someone to its works to inspect them. Defendant sent its superintendent for that purpose, one E. J. Lawless, a skilled engineer, who had had experience in the construction and practical operation of cable cars in San Francisco, before entering its service. He made a thorough examination of the cars, inside and out, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith, and requested the representative present of the plaintiff to finish the others up in the same way and forward them without further inspection.

The cars were delivered in installments between February 24th and March 30th, 1888, defendant making no objection as to the time of delivery, and paying the freight from Chicago to Kansas City, amounting with drayage, to $1,088.50.

On the 22d of March, 1888, defendant's superintendent took out one of the cars for trial on the east end of the line, and the following difficulty about the operation of the brakes was discovered: When they were so adjusted that they could be used to stop the car on a straight, level track, in passing around a curve or up a grade, they would bind against the wheels, causing them to slip and at times throwing the car from the track; if the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars. This difficulty the Court below called *a latent defect* "which did not and could not develop to the observation on inspection, and was only discoverable when put into use on the defendant's track or similar track."

On the 23d of March, 1888, Mr. Lawless, defendant's saperintendant, wrote to plaintiff's general manager, complaining of the unsatisfactory working of the brakes, explaining the nature of the defect, and asking what remedy he proposed. There was no suggestion in the letter about the rejection of the cars. In response to this letter, plaintiff's engineer, Mr. Twyman, came to Kansas City at once and attempted to remedy the trouble with the brakes, and on leaving, claimed that he had done so.

On April 5th, 1888, plaintiff's general manager wrote to defendant's president, stating that the entire lot of 25 cars had been delivered and bills rendered for $50,000.00, the original contract price without extras, and asking for a prompt remittance. *On the 7th of April, 1888, defendant's whole line was opened and the cars put into service, for the*

prosecution of its business, passengers being received and carried and fares collected for their transportation. Such use was continued from that date down to the 12th day of May, 1888.

On April 11th, 1888, defendant's President replied to the letter of plaintiff's General Manager of April 5th, stating that its line had been running since Saturday (7th) and that they would be operating with a full equipment if *they "had not been obliged to make constant repairs and changes to the car brakes,"* and that he should insist on these being made right before approving the bills for the cars. The letter proposed the following alternative to the plaintiff:

"If you will send a practical man here to take charge of these necessary changes, it would be the best plan, otherwise we shall make them and charge you with the expense."

There was no suggestion in the letter about rejecting the cars. In response to the request contained in this letter, plaintiff's engineer again went to Kansas City to aid in remedying the defects in the brake, but after doing some work thereon, was called away, and one of its workmen was sent out in his stead. He went over the cars one by one and pronounced them ready for service, but the same difficulty continued to recur. The defendant at this time had in successful operation upon its Twelfth Street line, combination cars made by the Laclede Car Company of St. Louis of a character similar to those made by plaintiff, but with a different kind of brake, costing from $75 to $100.

After the plaintiff's workman had failed to remedy the trouble with the brakes, defendant did not make the necessary changes itself and charge plaintiff with the expense, as proposed in its letter, nor did it apply brakes of the Laclede Car Company's pattern, but on May 12th, 1888, after the cars had been in service for more than a month, at a meeting of its board of directors, a resolution was passed rejecting the cars "on account of the imperfect brakes and other seriously objectionable features." Upon being notified thereof, plaintiff's General Manager at once wrote defendant to the effect that the cars were built according to plans approved by its Chief Engineer; that they were inspected and accepted by its General Superintendent before shipment, and that they were then shipped to and received by defendant and put in use upon its line; that upon complaint being made about the working of the brakes, a competent mechanic was promptly sent out to adjust them, who reported that the adjustments made by him were satisfactory to defendant. The letter closed with a demand for the payment of the contract price for the cars without further delay.

Upon plaintiff's refusal to take the cars back, they were stored in a house built by defendant for that purpose, and there they still remain.

The fares which defendant collected from the carriage of passengers from April 7th to May 12th, 1888, were never returned or offered to be returned to the plaintiff, and are still in defendant's hands.

DECLARATIONS OF LAW.

Upon its finding of facts, the Court declared the law to be, "that the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner set out in the foregoing special finding of facts, and that the defendant rescinded said contract in accordance with its legal right so to do, and made a lawful tender of said cars to the plaintiff, and is not liable to the plaintiff for the contract price of said cars, or any other sum, and that the defendant is entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City, amounting to the sum of one thousand, eighty-eight and $\frac{50}{100}$ dollars." (p. 36.)

An exception to this declaration of law was duly saved by the plaintiff.

The plaintiff asked the Court to declare the law to be that under its finding of facts plaintiff was entitled to recover from the defendant the contract price for said cars and interest. This declaration of law the Court refused to give, and plaintiff duly excepted. (p. 36.)

Plaintiff also asked the Court to give the following specific declarations of law:

"1. If the Court, sitting as a jury, finds from the evidence, that on the 14th day of June, 1887, the plaintiff submitted a proposition to the defendant to build for the defendant 25 combination closed and open cable cars as per general specifications attached thereto and made a part thereof and to deliver the same f. o. b. at Pullman Junction or Kensington, Ill., for the sum of two thousand dollars each, cash on delivery, and that said cars were to be inspected and accepted at the plaintiff's works; that defendant thereafter accepted said proposition, and when a portion of said cars were ready for inspection, defendant, at plaintiff's request, sent its inspector to examine the same; that he accordingly did examine the same, and, after pointing out certain defects, which were remedied, instructed plaintiff to make all the cars the same as the one he had examined, and that it would not be necessary for him to return and inspect the remainder, and to ship the cars as soon as completed; and that plaintiff thereafter did build all the cars in the same manner as the one which defendant's inspector had inspected, and delivered the same to defendant at Pullman Junction or Kensington, to be shipped over a line of railroad designated by defendant, and that the purchase price thereof has not been paid, then plaintiff is entitled to recover the purchase price of $50,000, with interest.

2. The Court declares the law to be that under the contract between the plaintiff and the defendant the inspection provided for covered the brakes as well as every other part of the car.

3. The Court declares the law to be that under the contract between the plaintiff and defendant the inspection provided for covered all defects, latent as well as patent.

4. The Court declares the law to be that, the contract between plaintiff and defendant being express that the cars should be inspected and accepted at the plaintiff's works, the law will not imply an agreement on the part of the plaintiff that the cars should be suitable for running on defendant's 12th street cable line.

5. The Court declares the law to be that, under the contract between the plaintiff and the defendant, the title to the cars vested in the defendant after the same were inspected and ordered shipped by defendant and plaintiff had delivered said cars free on board at Pullman Junction or Kensington, Ill., and that defendant thereupon became indebted to the plaintiff for the purchase price thereof as provided by said contract.

6. The Court declares the law to be that, under the contract between the plaintiff and the defendant, the defendant had no right to make the actual test of the cars upon its 12th street line before accepting the same as complying with the contract.

7. If the Court, sitting as a jury, find from the evidence that the average date of delivery of the 25 cable cars built by the plaintiff for the defendant and the presentation of the bills therefor was March 14th, 1888, then the Court will allow the plaintiff interest on the amount found in its favor at the rate of six per cent. per annum, from said March 14th, 1888.

8. If the Court, sitting as a jury, find from the evidence that the specifications attached to the contract between the plaintiff and defendant provided that the seats in the 25 cars should be the same as in the 16 foot cars recently built by the plaintiff for the defendant; that in said last named cars the seats were longitudinal, and that thereafter the said seats in said 25 cars were changed from longitudinal to cross seats by request of the defendant, and that the substitution of cross seats for longitudinal increased the actual cost of the cars and that the reasonable value of making such change upon the 25 cars was $3,162.50, and that the same has not been paid, then plaintiff is entitled to recover the sum of $3,162.50 with interest.

9. If the Court, sitting as a jury, find from the evidence that in addition to the building of said cars in accordance with the contract and specifications between the plaintiff and defendant that plaintiff at the request of the defendant furnished upon each one of said cars a gong and that said gongs were not included in said specifications, and

that the reasonable value of said gongs upon said 25 cars was figured $196.02, then the Court will find for the plaintiff for said sum, with interest.

10. If the Court, sitting as a jury, find from the evidence that the plaintiff at defendant's request furnished and supplied to each of said 25 cars two extra reliable sand boxes, including freight on said sand boxes from Boston; that said boxes were not covered by the original contract and specifications, and that the reasonable value of said boxes upon said 25 cars, including said freight, was figured $754.97, and that the same has not been paid, then plaintiff is entitled to recover said sum of $754.97, with interest.

11. If the Court, sitting as a jury, find from the evidence that after the twenty-five cars built by plaintiff for the defendant had been numbered in accordance with the contract and specifications between them; that the numbers of eleven of said cars were changed by direction of the defendant, and that the reasonable value of making such change was $39.75, and that the same has not been paid, then the Court will find for the plaintiff and against the defendant for said sum, with interest.

12. If the Court, sitting as a jury, find from the evidence that the said 25 cars were to be delivered to defendant free on board the cars at its works at Pullman, Ill., and defendant requested plaintiff to ship the same by the Chicago & Alton Railway; that in order to ship said 25 cars by said railway it was necessary for plaintiff to advance thereon the sum of $2.50 per car for having the railway cars on which said 25 cars were loaded transferred to the Chicago & Alton Railway; that said switching charges, amounting in all to the sum of $62.50, were paid by the plaintiff at the request of and on behalf of defendant, and that the same has not been repaid, then the Court will find for the plaintiff and against the defendant in the sum of $62.50, with interest.

13. If the Court, sitting as a jury, finds from the evidence that on or about March 14th, 1888, plaintiff shipped to defendant at Kansas City, at its request, six small metal wheels; that the same were reasonably worth the sum of $3.96, and that the same have not been paid for, then the court will find for the plaintiff and against the defendant for the sum of $3.96 with interest from said March 14th, 1888.

14. The Court declares the law to be that there is no evidence that plaintiff ever assented that the place for the final inspection and acceptance of the cars should be changed from its works to Kansas City.

15. The Court declares the law to be that there is no evidence of any consideration paid by the defendant to the plaintiff in order to secure the agreement to change the place of final inspection and acceptance from plaintiff's works to Kansas City.

16. If the court find from the evidence that after the cars had been inspected by the defendant's superintendent and had been delivered f. o. b. at Pullman Junction or Kensington in accordance with defendant's order, and over a line of railroad of its own selection, the defendant received the cars at Kansas City and put the same into service upon its 12th street line for the carriage of passengers for hire in the transaction of its business, then the defendant is not entitled, in any event, to rescind the contract with the plaintiff and must pay the purchase price therein stipulated.

17. The Court declares the law to be that if it appears from the evidence that defendant collected fares from the passengers while using said cars upon its 12th street line, and has retained the same, and has never returned or offered to return said fares, then defendant is not, in any event, entitled to rescind the contract between itself and the plaintiff, and must pay the purchase price of said cars as therein specified.

18. If the Court finds from the evidence that the defendant has never returned or offered to return said cars to Pullman Junction or Kensington, the place where they were delivered by the plaintiff to the defendant, as provided by contract between them, then defendant is not entitled to rescind the contract between itself and the plaintiff, and must pay the purchase price of the cars as therein stipulated." (pp. 209-12.)

But the Court refused to give said declarations of law or any or either of them, and plaintiff duly excepted. (p. 200.)

Judgment was rendered in favor of the defendant, and against the plaintiff, for $1,088.50, the amount of freight and drayage from Chicago to Kansas City. (p. 36.)

Plaintiff thereupon tendered its bill of exceptions and brings the case to this Court by writ of error.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in not holding the inspection of the cars made by defendant at the plaintiff's works final and binding upon it, and conclusive of the fact that the cars were made in accordance with the contract.

2. The Circuit Court erred in not holding that the defendant, by its President's letter of April 11th, 1888, elected to retain the cars and make or have made any necessary changes, and that defendant could not thereafter change its purpose and rescind the contract.

3. The Circuit Court erred in not holding that defendant waived the right to rescind the contract, if any such right existed, by the letter

of defendant's President of April 11th, 1888, in which it said that it would have changes made in the cars.

4. The Circuit Court erred in not holding that defendant, on the undisputed facts in the case, elected to keep the cars and to make or have made any changes or alterations necessary.

5. The Circuit Court erred in not holding that the defendant had waived any right it might have had to rescind the contract by the way in which it dealt with and used the cars.

6. The Circuit Court erred in not holding that the use of the cars on defendant's road and the collection and retention of fares from passengers, was a waiver of any right it might have had to rescind the contract and return the cars to plaintiff.

7. The Circuit Court erred in not holding that the defendant did not elect to rescind or put itself in position to refuse to pay the contract price for the cars, because it did not return the cars to plaintiff at its works in Pullman, Illinois.

8. The Circuit Court erred in holding that there was any implied warranty in the contract for the building of the cars that they would be well fitted for or adapted to any particular road, grades or curves.

9. (10) The Circuit Court erred in not entering judgment for plaintiff for the contract price of the cars, for the extras ordered by defendant, and for interest.

10. (29) The Circuit Court erred in declaring the law of the case to be—

"That the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner set out in the foregoing special finding of facts, and that the defendant rescinded said contract in accordance with its legal right so to do and made a lawful tender of said cars to the plaintiff, and is not liable to the plaintiff for the contract price of said cars or any other sum, and that the defendant is entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City, amounting to the sum of one thousand and eighty-eight and $\frac{50}{100}$ dollars, for which judgment will be entered."

11. (30) The Circuit Court erred in refusing, when requested by plaintiff, to declare the law of the case to be with the plaintiff, and that the plaintiff was in law, upon the finding of facts made, entitled to recover from the defendant the contract price for said cars with interest.

12. (31) The Circuit Court erred in not holding, as requested by plaintiff, that plaintiff never assented that the place for final inspection and acceptance of the cars should be changed from its works to Kansas

City; that under the contract between plaintiff and defendant, the inspection provided for covered the brakes as well as every other part of the cars; that the inspection provided for in the contract covered all defects, latent as well as patent; that under the contract the title to the cars vested in defendant as soon as the cars were inspected and delivered free on board at Pullman Junction or Kensington, Ills.; and defendant became indebted to plaintiff for the contract price; that it required a new consideration to support a change in that contract, and no such new consideration is shown; that the inspection and acceptance provided for in the contract prevented any agreement by implication that the cars would be fitted for use on any particular line; that no right was reserved in the contract to make a test on defendant's line; that the collection and retention of fares from passengers while the cars were used by defendant, without any offer by defendant to return said fares or turn them over to plaintiff, prevents defendant from attempting any recision of the contract, and that defendant cannot treat the contract as rescinded, as it has not returned the cars to plaintiff at its works or offered to do so.

13. (32) The Circuit Court erred in refusing to adopt and hold the declarations of law and each of them asked by plaintiff (pp. 1–8).

BRIEF.

I.

The contract governs the rights of the parties; it is complete within itself; it is clear, explicit and unambiguous; it is not void as against public policy; it is not tainted by fraud; it cannot be varied or added to by parol; no provision can be interpolated therein aside from what is expressly stipulated.

Dermott vs. Jones, 2 Wall. 1, was a case where a builder agreed to erect a building on the land of another, fit for her use and occupation. Owing to *a latent defect in the soil*, the foundation sank and the building became uninhabitable, and the land owner was put to large expense in rebuilding. To an action for the purchase price by the builder, she answered claiming a right to recoup her damages, which the lower Court having denied, this Court held she had the right to do. In delivering the opinion, Mr. Justice Swayne said:

"It is a well settled rule of law that if a party by his contract charge himself with an obligation possible to be performed, he must make it good, unless its performance is rendered impossible by the act of God, the law, or the other party. *Unforeseen difficulties, however great, will not excuse him.* * * * A party contracted to erect and complete a building on a certain lot. By reason of *a latent defect in soil* the building fell down before it was completed. It was held (School Trustees vs. Bennett, 3 Dutcher 513, * *), that the loss must be borne by the contractor. * * * The principle which controlled the decision of the cases referred to rests upon a solid foundation of reason and justice; it regards the sanctity of contracts; it requires parties to do what they agreed to do. If unexpected impediments lie in the way, and a loss must ensue, it leaves the loss where the contract places it. *If the parties have made no provision for a dispensation, the rule of law gives none. It does not allow a contract fairly made to be annulled, and it does not permit to be interpolated what the parties themselves have not stipulated.*"

De Witt v. Berry, 134 U. S., 306, was an action to recover the purchase price of 80 bbls. of japan and 20 bbls. of varnish sold under a written contract between the plaintiffs and the defendants, which provided that the goods were to be "exactly the same quality as that made for the De Witt Wire Cloth Company of New York and as per sample bbls. delivered." The defense was based upon the breach of an implied warranty of quality, and damages sustained on account thereof. The Court, in affirming a judgment of the court below in favor of the plaintiffs, uses the following language in the opinion:

"Now there is good authority for the proposition that if the contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty. * * * *

There are numerous and well considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use (citing authorities).

Nor is there any conflict between these authorities and others like them on the one hand, and those on the other, which hold that goods sold by a manufacturer, *in the absence of an express contract*, are impliedly warranted as merchantable, or as suited to the known purpose of the buyer. * * * * * * *

The third proposition, that the Court erred in excluding evidence of an antecedent conversation between the salesman and one of the plaintiffs in error, is disposed of by the well-settled rule, that 'when parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing, and all oral testimony of previous *colloquium* between the parties, * * * as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected' (citing authorities)."

In Seitz vs. Brewer's Refrigerating Co., 141 U. S., 510, the Court, speaking through Mr. Chief Justice Fuller, says in regard to written contracts:

"When the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties and the extent and manner of their undertaking, were reduced to writing."

Blackburn on Contract of Sale, (2nd Eng. Ed.) says on pages 198 and 199:

"The meaning of the contract is that which both parties intended it should have; it is, therefore, the common intention of the parties which has to be looked for, and where they have reduced their contract into writing, that, if it is not ambiguous, is conclusive evidence of their intention, and to put a meaning on the contract is simply a question of construction for the Judge."

In Sanders vs. McClean, L. R. 11, Q. B. Div. 336, Brett. M. R., says:

"*The Court has no right to import anything into a contract which it would not be clear to every reasonable man must have been present to the minds of both contracting parties, and agreed to by both.*"

"A manufacturer or grower is fairly held to stricter fulfilment in all such respects than the mere dealer in finished products, for his judgment, skill and due care are specially relied upon; but as the question, whenever a thing is made or raised, and supplied to order, arises upon the contract of the parties, which contract is likely in such instances, not only to state the purpose of manufacture, *but to be full of special stipulations*, we need not pursue an inquiry which takes us beyond the true limits of the law of sales. Where an existing specific definite thing is sold without an express warranty of quality, *caveat emptor* is the rule as to latent defects, if the seller has dealt honestly."

Schouler on Personal Property (2nd ed.) Sec. 366.

When the contract is in writing, an additional warranty, not express or implied by its terms, that the article is fit for a particular use, cannot be added, either by implication of law or by parol evidence.

Whitmore vs. South Boston, etc., Co., 2 Allen, 52, 58.

"The rule of law to be deduced from all the authorities on the subject is, that where a contract for the purchase or manufacture of specific articles, or of a certain class of articles, is in writing, and contains no express warranty of fitness of the article for a certain intended use, an implied warranty does not exist unless it can be made to arise from the contract itself. It must have its source, if at all, in some language, either of description or other character, employed in the contract."

A. & E. Encyc. Law, Vol. 10, p. 110. Note 1.

II

By the contract, the cars were to be inspected and accepted by the defendant at the plaintiff's works. This was one of the conditions proposed by the plaintiff before the contract for making the cars was executed by the defendant. That proposal was accepted by the defendant and became thereby one of the express terms of the agreement between the parties. This condition the plaintiff had the right to impose. By its acceptance the defendant agreed to pass upon the cars as to whether they complied with the contract or not, when they were completed and ready for delivery.

What did that provision of the contract mean?

Inspection is thus defined by the Century Dictionary: "The act of inspecting; critical examination; close or careful survey; specifically: a formal or official inquiry by actual observation into the state, *efficiency*, safety, *quality*, etc., of something of special moment, as troops, police, buildings, steam vessels, drugs, etc."

An inspector is defined by the same dictionary as follows: "One who inspects or oversees; one whose duty it is to secure by supervision the proper performance of work of any kind, or to *ascertain by examination the quality or condition* of the work, or *of any article offered for sale or transfer*."

From these definitions it clearly appears that by the contract between the parties, the defendant explicitly agreed that after the cars were built and had become specific articles, it would determine their quality and efficiency by an agent of its own choosing, to be sent to the plaintiff's works for that purpose. This it did, and by its inspector's acts, it is irrevocably bound. He went to the plaintiff's works for the express purpose of examining the cars which plaintiff had manufactured, and which it then and there tendered for acceptance as in compliance with the contract. He made as thorough an examination as he desired, and approved of the quality and efficiency of the cars and formally signified his acceptance thereof. Having gone to the plaintiff's works for the express purpose of inspecting and accepting the cars, as provided by the contract, the presumption is that he made all the inspection he deemed necessary for acceptance and defendant is bound by that presumption. The word acceptance implied the right of rejection if the inspector did not approve of the cars after he had examined them. His examination was complete; he asked for no additional facilities in mak-

ing it; he was an engineer of skill and cable railway experience in San Francisco—the original home of the cable railways of this country. He was at the time the General Superintendent of the defendant. His acceptance and approval were unequivocal and without reserve. His action in that regard was as conclusive as if the defendant's Board of Directors had inspected the cars and then met and passed a resolution formally accepting them. The quality of the cars had been subjected to the test provided for by the contract, and had successfully passed that test. After the inspection and acceptance by defendant's chosen representative, nothing remained for the plaintiff to do except to deliver them f. o. b. at Pullman Junction or Kensington, and this it did. That delivery was a delivery to the defendant, the railway company being its agent in that behalf, defendant paying the freight. Upon such inspection, acceptance and delivery, plaintiff's right to immediate payment of the contract purchase price was complete. The finding of facts upon these points is clear and emphatic.

It is as follows:

"11th. In December, 1887, in response to plaintiff's request that defendant send one of its employees to Pullman to *inspect the cars*, E. J. Lawless, defendant's superintendent, went there for that purpose. Ten or twelve cars were then in the shops of the plaintiff, on the floor where they were run out. *Said Lawless made a thorough examination of said cars, inside and out, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith*, and requested the representative present of the plaintiff to finish the others up in the same way and forward them without more. *No further request was made by said Lawless for testing said cars*, and no other facilities were offered by the plaintiff for making such test or examination."

"12th. The first five cars were shipped by plaintiff February 24th, 1888. The next shipment of eight cars was on March 1st, 1888. The next shipment was of two cars, March 17th, 1888. Five cars were shipped March 27th, 1888, and the remainder on the 30th day of March, 1888." (p. 30.)

"17th. The defendant paid the freight and drayage on said cars from Chicago to Kansas City, the sum of $1,088,50." (p. 35.)

"22d. Defendant had in its employ during the time in question two engineers of skill and experience, one of whom Mr. Lawless, the same person who went to Chicago to inspect the cars at plaintiff's yards, had experience in the construction and practical operation of cable cars in San Francisco, California, prior to the time of taking service from defendant." (p. 35-6.)

In Carson v. Baillie, 19 Pa. St. (7 Harris) 375, the Court says on page 380:

"Where goods are sold on inspection there is no standard but identity, and no warranty implied other than that the identical goods sold, and no others, shall be delivered. * * * * *

In Mathews v. Hartson, 3 Pittsb. 86, the Court says on page 89:

"As to goods and property bought on inspection, or with opportunity to inspect *except where there is superior knowledge on the part of the seller, not attainable by the buyer*, the rule is *caveat emptor*, and the only responsibility of the vendor is as to the identity of the goods bought and delivered."

In Lord v. Grow, 39 Pa. St. 88, Judge Strong, afterwards an associate justice of this Court, in delivering the opinion of the Court, after quoting from Carson v. Baillie, *ubi supra*, adds: "To the purchaser of goods on inspection, the language of the law is '*caveat emptor*.'"

Nofsinger v. Ring, 71 Mo., 149, was a case where plaintiff contracted with the defendant to sell defendant a large amount of meat and "that the meat should be inspected before it was delivered on board the cars, and one James McCullough, a professional inspector of meat, was employed by the defendant to see that the meat" was of the quality called for by the contract. The defendant then notified the plaintiffs to ship the meat as soon as inspected and pronounced according to the contract by the inspector. The defendants, not being satisfied with the quality of it, refused to receive it and plaintiff sued on the contract.

"The facts stated appeared in evidence at the trial, and the inspector also testified that the meat was according to contract. The defendant offered to prove that the meat was not according to contract, but this testimony was rejected by the court." On this state of facts the court held that the defendant was bound by the inspection, and that the exclusion of evidence tending to impeach the inspection was, in the absence of proof of fraud or bad faith, properly excluded, and, on page 151, said:

"No question is made as to the measure of damages, and we therefore omit the instruction on that subject. The substance of the agreement between the parties was that the defendant would accept such meat, when delivered, as had been inspected by McCullough, and pronounced by him to conform to the requirements of the contract. There is no allegation, nor is there any evidence of collusion between the inspector and the plaintiffs; and, in the absence of any such collusion, the purchaser was as much bound to receive the meat as if he had inspected it in person. And there can be no question that if Ring had himself inspected the meat and pronounced it according to contract, before it was packed and delivered, in the absence of any fraud or imposition on the part of the plaintiffs, he could not afterwards have refused to accept it

on the ground that it did not come up to the contract. No fraud or unfairness, on the part of the plaintiffs, was attempted to be shown. We think the testimony offered was properly rejected, and that the declaration of law given by the court was correct."

The same question, as to the effect of an inspection provided for in the contract, arose in the case of Black River Lumber Co. v. Warner, 93 Mo., 374. In that case the contract was an order, in the following words:

"Please saw for us the following bill, of white or burr oak, twenty-three dollars per thousand feet, f. o. b. cars here, commissions, etc., off, to be inspected at the mill, in lots not less than fifty thousand feet, and to be of sound timber, free from loose or rotten knots, to be suitable for car construction purposes."

Subsequently it was agreed between the parties "that the lumber should be inspected by the Union Pacific Railroad Company," and it was "inspected at the mill by Nash, who represented the Union Pacific Railroad Company." Subsequently, the defendant declined to receive the lumber, and suit was brought on the contract. The Court found that some of the lumber did not come up to the contract, but held the defendant bound by the inspection, and, on page 386, said:

"Some of the lumber inspected at the mill, and shipped to the defendants, it now appears, did not come up to the contract. It was all of the same general quality, and it seems Nash reported his inspection by pieces to the defendants. If the defendants accepted and received the lumber as in part compliance with the contract, they are liable for the contract price. Crawford v. Elliott, 78 Mo., 497; Stephens v. McKay, 40 Mo., 224. It would seem that the inspection and acceptance of the lumber by Nash should settle all such questions, no fraud being alleged or shown."

The same point is decided in 7 Mo. App. In the appendix of cases not reported in full, on page 590, occurs the following:

"One, who, having opportunities to inspect the goods, buys without express warranty, is bound by the contract price, and warranty will not be implied from mere words of description. Muhr, *et al.*, Resp., v. Eagle, App., No. 1,242. G. H. Hospes for appellant; A. Binswanger, for respondents. Opinion by Hayden, J."

The effect of an inspection by the purchaser upon goods manufactured to order has been considered by the New York courts, and the same conclusion reached as that at which the Supreme court of Missouri arrived. The case of McParlin v. Boynton, 8 Hun., 449, is a case very much in point. The contract there made was, if anything, more in favor of the purchaser than the one in the case at bar. The court found an express warranty in the contract. The warranty in the contract in the case at bar is only an implied one at best. An inspection was provided for and the purchaser sent an inspector. The inspector carried on the

inspection to suit himself, and the court expressly found that he was not denied any opportunities of inspection. The finding of facts in the case at bar is clear that Lawless, defendant's superintendent, was not denied any opportunities of inspection or any request that he made for facilities for inspection. In the McParlin case, the court found that the goods did not come up to the warranty of the contract, which is all that the defendant claims in the case at bar.

In its opinion the Court said:

"The evidence tends to show, and there can be little doubt that a very considerable number of the saws so manufactured turned out to be badly tempered, and in consequence soft and useless for the purpose for which they were intended. Many of them were afterwards re-tempered by the plaintiffs at the expense of the parties from whom they were received, or of defendant, and many others remained on hand undisposed of, which were not re-tempered.

There can be no doubt that the contract contains an express warranty of the saws, upon which the defendant would, in the absence of other provisions in the contract, be entitled to recoupment of damages in this action. The warranty is in these words: 'These saws are to be made of William Jessop & Son's best cross-cut steel, hardened and tempered carefully, ground to three gauges thin on back, and filed, set and warranted best in every particular.'

The defendant is therefore entitled to a new trial in this case unless he is precluded from asserting the warranty by certain other provisions of the contract. Immediately following the warranty above quoted, the contract contains these words: 'The saws to be tested by your man employed for the purpose of filing and finishing same, we to furnish a room and bench for his use at our shop, free, you to furnish him the necessary tools for his work.' This raises the question, whether the parties have not, by the express terms of the contract, provided a means for determining, before delivery, whether or not the saws to be manufactured were of the kind required by the contract, in conformity to the warranty. *It was very clearly in their power to make such an agreement; and where parties stipulate that articles to be manufactured shall be of a particular kind and quality, and at the same time stipulate that they shall be tested by some person selected by the purchaser before delivery, to ascertain whether they are of the specified kind and quality, and such test is, in fact, made by him, and the goods are thereupon delivered and accepted, no remedy by action can be had upon the contract, although the goods, or some portion of them, are subsequently ascertained not to be equal to the warranty. In the absence of fraud and of collusion between the manufacturer and the person selected, his decision upon the test that the articles are such as the contract requires is conclusive against the purchaser who subsequently receives them.*

* * * * * * * *

The defendant had the privilege of selecting any person he chose. It was both his interest and duty to select an entirely competent and skillful man. If he failed to do that it was his misfortune or neglect.

It is more than probable that the defendant selected an incompetent man, but as all the saws, as they were made, were delivered into

his hands, and passed upon by him, and subsequently delivered to the defendant, no remedy remained for lack of compliance with the contract, unless on some ground of fraud, which is not alleged. The result of this view of the contract is, that the conclusion of the referee as to the liability of the defendant for the saws manufactured is correct; *and his finding that the defects were readily discoverable by the use of certain appliances, becomes immaterial.*"

The last sentence of the last extract from this opinion shows that it is immaterial whether defects were readily discoverable or not. A full inspection was provided for, and the defendants were bound by it. The case just discussed is strongly in point, in that it holds defendants bound by the inspection, even although the defects were not readily discoverable, or the inspector incompetent. The goods did not come up to the contract, and the inspector was an incompetent man.

The same question arose in Dustin v. McAndrews, 44 N. Y., 72. The contract in that case was for the sale and delivery of a large amount of hops by plaintiffs to defendant. The contract provided that the sale was "subject to J. S. Brown's inspection, or other mutually satisfactory." J. S. Brown was connected with the vendor's firm, and an attempt was made to hold the fact of the inspection not binding, because it was practically made by the vendors. The court, however, held that although it was unusual to have an inspection made by the vendors, yet if the parties agreed to such an arrangement, as they had done, such inspection would be as binding as an inspection by the defendant, unless fraud or bad faith was shown, and said, on page 76:

"The contract required that the hops should be inspected by J. S. Brown or some other inspector satisfactory to both parties."

"The contract was for the sale and purchase of hops of a certain description, and the object of the inspection was to determine, for the benefit of both parties, whether they answered that description. Until the vendors delivered the hops with the inspection, the vendee was not obliged to pay, and when so delivered, the vendors were entitled to the purchase price. The inspection was thus as much for the convenience and benefit of one party as the other. Its purpose, like similar provisions in a variety of contracts, was to prevent dispute and litigation at and after performance."

The effect of an examination, whether provided for in the contract or not, and an acceptance after such examination, was considered in McCormick v. Sarson, 45 N. Y., 267. Lumber of a particular kind and quality had been ordered, and after it was prepared for shipment, it was examined by the purchaser and accepted. Afterwards the purchaser set up the defense that the goods were not up to the contract. In deciding the matter the Court said:

"The evidence then before the Court proved that the lumber had been *delivered* and *accepted* by defendant's agent as of the qualities

claimed. The contract had been executed. The receipt was evidence that the defendant had knowingly accepted this lumber and received it as of such quality. The testimony offered did not propose to contradict that; in fact, it was entirely in harmony with that evidence. It said, virtually, 'I had accepted it as prime, but afterwards I ascertained it was not prime. I changed my opinion and judgment; the fact was otherwise.' This will not do. If he accepted it after examination, or after an opportunity for examination, as fulfilling the contract, he is bound by such action. This rule is well settled."

Monitor Milk Pan Co. vs. Remington, 41 Hun., 218, was a case where the plaintiff manufactured milk pans for defendant, who was to inspect them before delivery. The enamel upon them was not good and did not resist the action of the acid of the milk. The defect was not discovered by the inspector.

The Court says on page 226:

"The referee found, as a matter of fact, that the quality and fitness of the enamel was ascertainable by applying lactic acid.

It was the neglect of the plaintiff that the test was not made. It had the opportunity to select a party capable of making such a test. If it failed to make the proper selection that failure was because of its inattention to its privileges and rights. The neglect may not be excused by the findings of the referee, to the effect that that test 'was not known by either party,' nor by the finding that 'there is no evidence that it was known except to scientists,' nor by the finding that the test was not in practical use." * * *

And again on 227, the Court, after quoting from Gurney vs. Atlantic & Great Western Railway Company, 58 N. Y., 358, says:

"It would seem that the case from which the quotation has just been made warrants the conclusion that when the contract in terms prescribes an examination or inspection or a test, and an opportunity has been offered for the exercise of that option and privilege on the part of the vendee to examine, inspect and test, and it has been exercised, and it appears that there has been no fraud or collusion in the test, examination or inspection contemplated by the contract between the parties, it is to be deemed final and binding on them. In the case in hand the plaintiff's agent, by it selected for the express purpose of making suitable and proper inspection, examined all the pans and the enameling thereon, and approved of the same. If he was incompetent, if he was negligent, if he was inattentive, the responsibility for such neglect, inattention or want of capacity according to McParlin vs. Boynton, should fall upon the plaintiff."

Churchill, J., in a separate concurring opinion, says on page 229:

"If it be true as found by the referee, that the inspection made was not conclusive except as to the patent defects and such as were discoverable by observation, and that the plaintiff was in no wise con-

cluded by such inspection and subsequent acceptance as to latent defects, the provision for such inspection was surplusage, since such defects would have been waived by acceptance without any provision therefor in the agreement. This provision for inspection should be construed to mean something equally with the words 'in a good, workmanlike manner.' If not limited to patent defects it must extend to and include latent defects, and in the absence of collusion or fraud bar any recovery therefor."

In Barnard v. Kellogg, 10 Wall., 383, the Court, speaking through Mr. Justice Davis, says on pages 388-394:

"No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. * * * Barnard expressly stipulated, as a condition of the sale, that Kellogg should examine the wool, and he did examine it for himself. * * * If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know or have reason to believe that the wool was falsely packed. The case of Salisbury v. Stainer, reported in 19th Wendall (158), is similar in its facts to this case, and the Court applied to it the rule of *caveat emptor*. There bales of hemp were sold which turned out to be falsely packed. The purchaser wished to treat the sale as a sale by sample, but the Court said to him: 'You were told to examine for yourself, and having opened one bale, and at liberty to open all, and omitting to do it, you cannot be permitted to allege that the sale was a sale by sample, nor to recover damages as on an implied warranty.' It is therefore, clear by the general principles of law, adopted in the interests of trade and commerce, that the seller in this instance was not

answerable for any latent defects in the bales of wool. * * * The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do, and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects."

III.

Under the express contract between the parties in this case, providing for inspection and acceptance at plaintiff's works, the implied warranty of fitness to be determined by a test on defendant's line is excluded, notwithstanding that plaintiff is the manufacturer.

At common law, the ordinary rule in the sale of personal property is *caveat emptor*. This rule was originally universal and inflexible in the absence of fraud or express warranty, and applied to all sorts of defects, latent as well as patent. As time went on, exceptions to the rule were created by the courts. Among others, in the case of orders given to a manufacturer, where the buyer necessarily trusted to the judgment of the seller, and did not exercise his own judgment upon inspection, there was a warranty implied that the articles ordered and made would be reasonably fit for the purposes for which they were manufactured. This implication of the law was subject to exclusion by express agreement of the parties. In the case at bar, the implied warranty of fitness, to be decided by a test on defendant's line, is *ex vi termini* excluded by the specific provision which requires the buyer to determine the fitness by examination at the manufacturer's works before delivery.

The implied warranty of fitness on the part of the manufacturer is based upon the assumption that the purchaser necessarily relies on the seller's superior knowledge and judgment. Where the buyer has the same knowledge and means of knowledge, and exercises his own judgment, the reason for implying the warranty fails, and no such warranty is implied.

Cessante ratione, cessat et ipsa lex.

"Where a buyer buys a specified article, the rule of *caveat emptor* applies; but where the buyer orders goods to be supplied, *and trusts to the judgment of the seller* to select the goods which shall be applicable to the purpose for which they are intended, which is known to both the parties—there is an implied warranty that they are fit for that purpose."

Chitty on Contracts (Ed. 1881) p. 417.

"As a general rule, there is no implied warranty of quality in the sale of personal property, *where the buyer has an opportunity to inspect the goods* and determine the quality for himself. In the absence of fraud, and of an express warranty, *each of the parties relying upon his own judgment*, the maxim *caveat emptor* applies. * * *

In a sale by a manufacturer, * * * where goods are bought for a particular purpose or use, known to the vendor, and are selected by him, *the buyer not relying on his own judgment*, there is an implied warranty that the articles shall be fit for such purpose or use."

Smith on Personal Property, 183, 4.

In Benjamin on Sales, Sec. 661, *ibid.*, it is said:

"If a man buy an article for a particular purpose, made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter*, if the buyer purchases on his own judgment."

"One exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should 'beware,' or should take care to ascertain for himself the quality of the thing he buys, becomes utterly unreasonable under circumstances which make such care impossible. If, therefore, the seller alone possesses the requisite knowledge, or the means of knowledge, and offers his goods for sale under circumstances which compel the purchaser to rely upon the judgment and honesty of the seller, without any examination on his own part as to the quality of the thing offered, it has been held that the rule of *caveat emptor* does not apply, because it cannot apply, and that the seller warrants that the goods he offers for sale are, in respect to their qualities, what the purchaser may fairly understand them to be; in other words, that they are of merchantable value, and proper subjects of trade. *It might seem that the reason of this rule should apply to all cases where an article is sold of which the value is materially affected by some defect which the buyer cannot know or discover. But it is not yet conceded that in all such cases there is an implied warranty. The implication does not appear to extend to cases where an examination would be fruitless, but only to those in which there can be no examination.*"

Parsons on Contracts (7th Ed.), Vol. I, pp. 583-4.

"Where a manufacturer or dealer contracts to supply an article, which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that *the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer*, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied, since here *the buyer does not purchase upon his own judgment*, but relies upon that of the seller."

Biddle on Chat. War., Sec 167.

"The case, where the vendor's skill is relied upon, must, however, be distinguished from cases where, though the special use to which the

goods are intended to be applied, is communicated to him, *yet the buyer buys on his own judgment.*"

Biddle, Sec. 171.

Story on Sales says in Sec. 371:

"Upon an executory contract to manufacture an article, or to furnish it for a particular use or purpose, a warranty will be implied, that it is reasonably fit and proper for such purpose and use, as far as an article of such a kind can be. This species of warranty is distinguishable from the last mentioned, in that the goods sold are either not in existence, or are to be procured for the vendee, *and are not selected or specifically designated by him. If a purchaser select a particular article, trusting to his own judgment*, he cannot afterwards hold the vendor responsible, on the ground that it turns out to be unfit for the purpose for which it was designed, because *the skill and judgment of the vendor are not relied upon.*"

Miller on Conditional Sales, after stating the general rule as to the implied warranty of fitness on the part of a manufacturer, says on pages 95–6:

"This rule is, however, limited to those cases where the article is not only ordered for a particular purpose, but where the manufacturer, knowing the purpose, undertakes to meet the requirements, and the buyer trusts to the judgment and skill of the manufacturer."

In Barnett v. Stanton, 2 Ala., 195, it is held that if manufactured goods are open to inspection, and are actually examined by the purchaser before the sale, there is no implied warranty of quality, although the manufacturer himself be the vendor.

Where goods sold are present and in view of the parties, a warranty of quality will not in general be implied.

10 A. & E. Encyc. Law, 128-9, and cases cited in note 1.

So far as an ascertained specific chattel, *already existing*, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality.

Benj. on Sales (Bennett's Ed., 1888), Sec. 644.

In Note 16, on pages 627–8, the learned editor uses this language:

"In purchases for a particular use made known to the seller, *if the buyer relies on the vendor's judgment to select and not on his own*, there is an implied warranty that the article furnished is reasonably fit and suitable for that purpose. This is more obvious when the seller is also the manufacturer, but it is equally true when he is only a merchant, *provided always the buyer in fact relies upon the seller's judgment, and does not inspect and select for himself.*"

Tiedeman on Sales, in speaking of the doctrine of *caveat emptor*, says in Section 187:

"Wherever the buyer has the opportunity of inspecting the goods, and the defects could be discovered by him, if discoverable at all, the maxim applies, and he is required to exercise his own judgment. There will be no implied warranty of quality in such cases. And no warranty of quality will be implied in such a case, even where the defects are latent, and cannot be discovered by the buyer after the closest examination, and the buyer is without remedy, unless the seller is guilty of fraud or the buyer has protected himself by an express warranty."

The same author says relative to the implied warranty of fitness on the part of a manufacturer in Section 190:

"In order that the implied warranty of merchantability and fitness for a particular use may be claimed, *the buyer must not himself select the goods.* * * * * * * *

The dealer or manufacturer is not liable on any implied warranty, if the buyer relies upon his own judgment in the selection of the goods, although the seller may know that the buyer is buying them for a particular use, and that they are not fit for that use."

"For latent defects unknown to the seller, in a specific thing sold, there should be clear evidence of an express warranty on his part, in order to render him liable."

Schouler's Pers. Prop. (2d. Ed.) Sec. 334.

"But the warranty of merchantable quality or fitness for a designated purpose is only implied so far as the described thing is ordered *under circumstances showing that the buyer does not mean to rely upon his own judgment in estimating its qualities*, and hence, wherever a special, known, described, and definite thing is ordered from the dealer or manufacturer, and he accordingly furnishes, in fair compliance with such order, that particular thing, or, in other words, a merchantable chattel of the kind called for, it is the buyer's misfortune if that kind of chattel prove unsalable, or unfit for a particular purpose which the buyer had in mind; for the doctrine of implied warranty does not reach the case. * * * * * * *

It is also held, in a case of sale by description, that the warranty which the law usually implies, because the buyer has had no opportunity to inspect the goods, does not extend to cases where the buyer should have inspected, though it would have been inconvenient to do so."

Schouler, Sec. 356.

Hare in his work on Contracts says on page 469:

"The authorities agree that *so far as the purchaser relies on his own judgment*, he must bear any loss that may arise from his want of skill or knowledge, whether the sale be executory or of a specific thing."

The same author says on page 490:

"The law then resolved itself into this, that if a man sells, generally he undertakes that the article sold is fit for some purpose. If he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose.

Such, as I have already stated, is undoubtedly the rule where the choice is left to the vendor, and he selects or offers a specific thing as that which will suit the purchaser, *but not where the purchaser chooses for himself*, although the purpose for which he buys is known to the vendor."

Bluett v. Osborne, 1 Starkie, 384, was a suit brought to recover the purchase price of a bow-sprit, which, at the time of the sale, appeared to be perfectly sound, but which, after being in use some time, turned out to be rotten. Defendant, before making the purchase, had had an opportunity of inspecting the bow-sprit.

Lord Ellenborough delivered the opinion of the Court in the following language:

"A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold. In this case the bow-sprit was apparently good, *and the defendants had an opportunity of inspecting it.* No fraud is complained of, but the bow-sprit turned out to be defective upon cutting it up. I think the plaintiff is not liable on account of the subsequent failure. In the case cited, what the plaintiff deserved was the value of the building; what he deserves here is the apparent value of the article at the time of delivery. *Supposing the price to have been paid on delivery, could it have been recovered back?* Verdict for plaintiff, damages £60."

Mellor, J., in Jones v. Just, L. R. 3 Q. B. 197, where certain hemp was sold to arrive, says:

"The buyer bought for the purpose of sale, and the seller could not, on any other supposition than that the article was merchantable, have found a customer for his goods, *and the buyer must be taken to have trusted to the judgment, knowledge and information of the seller, as it is clear he could exercise no judgment of his own; and this appears to us to be at the root of the doctrine of implied warranty;* and that in this view it makes no difference whether the sale is of goods specially appropriated to a particular contract, or to goods answering to a particular description."

In Getty vs. Roundtree, 2 Chand. (Wis.) 28, the Court after discussing the general doctrine of *caveat emptor*, says:

"But executory contracts and contracts to furnish articles for a specific purpose, especially by manufacturers, have generally been regarded as resting on a different basis. In such cases there is held to be an implied warranty that the article delivered shall answer the purpose for which it was designed, *inasmuch as the parties have no opportunity to inspect it, or to decide upon its fitness in the first instance.*"

In Hood vs. Bloch, 29 W. Va. 244, which was the case of a sale of certain cheese by a manufacturer, the Court says on pages 254–5:

"In this case it must be assumed that the buyer and seller both contemplated a dealing in cheese that was merchantable. Bloch Bros., the buyers, were merchants, dealing in Swiss cheese, and they bought for the purpose of sale, and Hood, the seller, could not on any other supposition than that the cheese was merchantable have expected or believed that Bloch Bros. would buy it; and the latter must be taken to have trusted to the judgment, knowledge and information of Hood, the seller and manufacturer of the cheese, as it is clear that they could exercise no judgment of their own, the parties at the time of the sale being in the city of Wheeling and the cheese in the cellars of Hood in a distant county. *This necessary trust in and reliance upon the judgment and information of the seller seems to be at the root of the doctrine of implied warranty*, and in this view it makes no difference, whether the sale is of goods specially appropriated to a particular contract, or to goods purchased as answering a particular description."

Eagan v. Call, 34 Pa. St., 236, was an action for the purchase price of a horse, the defense being that the horse was unsound at the time of sale. The defense was held good by the Court below on proof of the fact, without showing knowledge on the part of the plaintiff. Judge Strong, afterwards a member of this Court, in reversing the judgment, uses this language in the opinion:

"There are also to be found decisions in which it has been held that the law implies in the case of a sale of goods by a manufacturer that they are of a merchantable quality; and other decisions ruling that where goods are sold for a particular use there is an implied warranty that they are fit for that use. But it cannot be generally maintained that *where the buyer has had an opportunity of examining the article* there is any engagement implied in the contract of sale that the seller warrants against latent defects unknown alike to himself and to the purchaser."

Cram v. Gas Engine and Power Co., 26 N. Y., Sup. 1069, 1068, was an action to recover damages for breach of warranty. Haight, J., in delivering the opinion of the Court says:

"It may also be stated as a rule that where a manufacturer contracts to supply an article which he manufactures, which is to be applied to a particular purpose, and where the buyer has no knowledge of the article, but necessarily trusts to the judgment and skill of the manufacturer, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied. This is the extent to which the authorities go. (Citing authorities.)

On referring to the request to charge, it will readily be seen that it does not embrace the essential elements of the latter rule. The charge is limited to cases in which the article bargained for was for a particular purpose or use, and does not embrace the want of knowledge of the character and fitness of the article by the buyer, or that he trusted

to the judgment and skill of the maker as to its fitness. If, therefore, the plaintiff knew all about naphtha, and its use in launches, he could not be deemed to have relied upon the judgment of the defendant's president, and there consequently could not have been an implied warranty that its use was safe."

Milwaukee Boiler Co. v. Duncan (Wis.), 58 N. W. 232, was an action by the plaintiff for the balance due on the price of a boiler furnished on defendant's written order, giving the dimensions and providing that it be allowed 130 pounds of steam working pressure by United States inspectors. In affirming a judgment in favor of the plaintiff in the Court below, the Supreme Court says:

"It was plain that the defendant got the exact article or thing he bargained for, and, although it may have been stated that it was required for a particular purpose, still, as he did not exact an express warranty, he took the risk of its fitness for the intended use, and no warranty in that respect can be implied. Benj. Sales, 557; Chanter v. Hopkins, 4 Mees. & W. 399; Ollivant v. Bayley, 5 Q. B. 288. * * * Where the buyer in such case gets what he has bargained for, there is no implied warranty. Seitz v. Machine Co., 141 U. S. 518, 519, 12 Sup. Ct. 46; Goulds v. Brophy, 42 Minn. 109, 43 N. W. 834; Deming v. Foster, 42 N. H. 165. The distinction seems to be between the manufacture or supply of an article to satisfy a required purpose and the manufacture or supply of a specified, described and defined article, as in this case. In the former case there may be an implied warranty, but in the latter there is none. It is equally well settled that, if the article is sold by a formal written contract which is silent on the subject of warranty, no oral warranty made at the same time or previously can be shown, as the writing is conclusively supposed to embody the whole contract; nor can any additional oral warranty be ingrafted or added to one that is written."

Dushane v. Benedict, 120 U. S., 630, was an action by a rag dealer against paper makers to recover $813.03 for rags sold and delivered by him to them. The defendants relied upon a warranty or a fraudulent representation that the rags were clean and free from infection. The rags delivered were infected with the small pox, causing the breaking out of the disease in the defendants' mill and consequent injuries to their workmen and their business. The Court, in discussing the principles of law applicable to cases of sales, says in the opinion:

"When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, *and the buyer has no opportunity to inspect them before delivery*, there is an implied warranty that they shall be reasonably fit for that purpose." (Citing authorities).

In DeWitt v. Berry, 134 U. S. 306, the following passage from the case of Jones v. Just, L. R. 3 Q. B. 197, 202, is quoted with approval:

"Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for

a particular purpose, still if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."

Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, was an action brought to recover the purchase price of a refrigerating machine sold by the plaintiff to the defendant under a written contract. The defendant stated in his answer, among other things:

"That the machine placed in defendant's brewery was worthless and incapable of operating to produce the results represented by plaintiff to this defendant as an inducement to enter into the said aforesaid agreement; that said machine has not been accepted by this defendant nor operated or attempted to be operated by defendant, his agents, employes nor any other person acting by or under his authority, and did not pass out of the control of the plaintiff, nor has the said machine been used by him in his said brewery, because said machine was worthless and incapable of serving any useful purpose therein."

A counter-claim for damages was also inserted in the answer based upon false and fraudulent representations made by the plaintiff as to what the machine would accomplish.

The Court, speaking through Mr. Chief Justice Fuller, in affirming the judgment in favor of the plaintiff in the court below, says:

* * * * * * * *

"Failing in respect of the alleged warranty, plaintiff in error contends, secondly, that there was an implied warranty, arising from the nature of the transaction, that the machine should be reasonably fit to accomplish certain results, to effect which he insists the purchase was made. It is argued that the evidence tended to establish that the plaintiff knew that the defendant had been cooling his beverage with ice, and that the object of obtaining the machine was to render unnecessary the expense of purchasing ice for that purpose; and that unless the machine would cool it to the same extent, or about the same, as the ice did, it would be worthless, so far as he was concerned. * * *

The rule invoked is, that where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, *so that the buyer necessarily trusts to the judgment of the manufacturer*, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text books and sustained by authority, that where a known, described and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. (Citing authorities.) * * * * * *

This is not the case of an alleged *defect in the process of manufacture known to the vendor but not the purchaser, nor of presumptive and justifiable reliance by the buyer on the judgment of the vendor rather than his own*, but of a purchase of a specific article, manufactured for a particular use, and fit, proper and efficacious for that use, *but in respect to the operation of which, in producing a desired result under particular circumstances, the buyer found himself disappointed.*"

Van Winkle v. Crowell, 146 U. S., 42, was a case growing out of the manufacture and sale of certain cotton seed oil mill machinery, under a written contract, the controversy being between the plaintiffs as sellers and the defendants as mortgagees of the purchasers. Mr. Justice Blatchford, in delivering the opinion of the Court, announces several principles peculiarly applicable to the case at bar, the contract being substantially similar, but containing no provision for inspection. He approves the action of the lower Court in excluding testimony to the effect that the machinery was manufactured under a guaranty, and that the plaintiffs permitted its operation by the purchasers in order that it might be fully tested, and also that the plaintiffs were to erect the machinery, "on the ground that the written contract was the evidence of what the plaintiffs agreed to do."

"That contract," says Mr. Justice Blatchford, "contained no guarantee, except the implied guarantee that the machinery should be reasonably fit for the uses for which it was sold."

* * * * * * * *

"*The contract contained no stipulation that Belser and Parker* (the purchasers) *were to be allowed to test the machinery before accepting it.* Moreover, any provisions in regard to erecting or testing the machinery would have been for the benefit of Belser and Parker, and could have been waived by them. *They had a right to accept it without testing it, and even before its erection;* and the plaintiffs had no right to insist that it should not be accepted until after those things had been done. *Whenever Belser and Parker did any act which showed that they had waived those things and accepted the machinery, the title to it vested at once in them.* * * * * * * * *

"By the terms of the contract one of the payments was to be made by Belser & Parker on their receipt from the plaintiffs of the bill of lading; and under that provision the title passed to Belser & Parker as soon as they received the machinery, if not before."

Sheffield &c. Ry. Co. v. Gordon, 151 U. S., 285, involved the finality of an inspection made of certain furnaces built by the firm of Gordon and others for the railway company under a written contract. Mr. Justice Brown, in delivering the opinion of the Court, says:

"It would appear from the report and the recital in the final decree of the Court that the main contest was over the construction of a certain guaranty in the contract that 'all the work' was 'to be done in good and

workmanlike manner and of suitable material, and each part to be adequate in design, strength, capacity, and workmanship for the purposes for which it was intended, for the sum of $564,000.' Immediately following this is a stipulation that the 'superintendent shall pass upon the work every two weeks, and if to his satisfaction, it shall be a final acceptance by the company' so far as done. But if not in compliance with the contract, and to his satisfaction, as to the quality of material or character of workmanship, 'petitioners agreed to make it so as rapidly as possible.' The evidence showed without contradiction, that one Doud, who was the superintendent of the Coal and Iron Company, made inspections and supervised the work from time to time, and accepted when in his judgment, it was in compliance with the contract. * * *

The master and the Court agreed in holding that the interven ors did not guarantee in their contract that the work or plant *as a whole* should be adequate in design, strength, capacity, and workmanship for the purposes intended and specified, and that, as an acceptance of the work bi-weekly as it progressed, was shown, and a further *acceptance of the whole on completion of the contract was made by the superintendent, in compliance with the terms of the contract, such acceptance, in the absence of fraud or mistake on the part of the superintendent, was conclusive upon the company.* We see no reason to question the correctness of this conclusion.

It is difficult to see what effect should be given the acceptance of the work by the superintendent if not to foreclose the parties from thereafter claiming that the contract had not been performed according to its terms."

The case of Kellogg Bridge Co. vs. Hamilton, 110 U. S. 108, relied upon by the defendant in error, is clearly distinguishable from the case at bar. In the contract between the parties in that case there was no provision for inspection and acceptance, and the false work which the Bridge Company had built under the water, and which Hamilton did not inspect, having proved insufficient to support the structure, it was properly held that the Bridge Company had impliedly warranted that it was fit for such purpose.

The cases to which reference is made in the opinion clearly support the proposition that where the buyer purchases upon his own judgment, there is no implied warranty of fitness.

In Parkinson v. Lee, 2 East. 314, which is one of the cases referred to by Mr. Justice Harlan, Grose, J., says in his opinion:

"The mode of dealing is that the plaintiff buys hops from the defendant, whom he knows is not the grower, by samples taken from the pockets in which the commodity is close packed. He has opportunity of judging by the samples such as he finds them at the time. If he doubt the goodness, or do not choose any risk of a latent defect, he may refuse to purchase without a warranty. If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But if there be no such warranty and the seller

sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact. It is the fault of the buyer that he did not insist on a warranty."

Lawrence, J., says in his opinion:

"It is not pretended that the defendant has been guilty of any fraud or imposition in the sale. And I must suppose that each party was equally well acquainted with the commodity bargained for. There was no representation made by the defendant to the plaintiff as to the goodness of the hops, to induce him to make the purchase. But here was a commodity offered to sale, which might or might not have a latent defect; this was well known in the trade; and the plaintiff might, if he pleased, have provided against the risk, by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and *he exercised his own judgment upon it;* and knowing, as he must have known, as a dealer in the commodity, that it was subject to the latent defect which afterward appeared, he bought it at his own risk. I know of no authority which makes the seller liable for a latent defect where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing."

Le Blanc, J., says:

"The inclination of my mind at the trial was, that the jury should find for the plaintiff, because the drawing of fresh samples, or the inspection of the commodity itself in bulk, would have afforded no information to the buyer as to the latent defect which afterwards appeared, and therefore it occurred to me that as there was no want of prudence on the part of the buyer, and the defect was of such a nature that no inspection of the thing could have led to a discovery of it, the law would on that account raise an implied undertaking on the part of the seller that it was a merchantable commodity, such as it appeared then to be. But, upon further consideration, as the same rule which applies to other cases must govern this, and as in the only instances in which the same question has come directly in judgment, namely, in sale of horses, it has been considered that without a warranty of soundness by the seller, or fraud on his part, the buyer must stand to all losses arising from the latent defects; and as I see no ground for distinguishing between this case and those, and no instance has been produced in which a contrary rule has been laid down in respect of any other commodity, I therefore concur with my brothers, that there should be a new trial."

Shepherd v. Pybus, 3 Man. & Gr., 868, another authority cited by Justice Harlan, was an action to recover damages for a breach of an implied warranty upon the sale of a barge to the plaintiff. The barge was made by the defendant and the warranty alleged was an implied warranty of fitness. There was no provision in the contract between the parties for inspection and acceptance at the place where the barge was built. Upon trial, it was found to be defective. An implied warranty of fitness for general use as a barge was asserted by the Court.

Tindal, C. J., in delivering the opinion says:

"On the part of the defendant it was urged, that this case was distinguishable from that of Brown v. Edgington, by the circumstances that the rope, which was there the subject of dispute, was to be made, or procured to be made, by the seller, for the particular purpose pointed out by the purchaser, *who had no opportunity of inspecting the article before it was furnished and fixed by the seller; and that the rope was purchased upon the faith of the seller's skill and knowledge, and not upon the inspection or judgment of the purchaser, upon which ground alone that case was decided;* and it was further insisted that where, as in the present case, the bargain was for a specific chattel, of which the purchaser had an opportunity of making inspection, and which he actually had inspected after it was built and before the agreement for purchase was made, no warranty as to the quality of the article can be implied; and that, unless there be an express warranty, or fraud can be proved, no action can be maintained by the purchaser for any defect he may afterwards discover in the article purchased; and, in support of this position, the cases of Parkinson v. Lee, and Bluett v. Osborne were cited and relied on."

The Court then discusses the case of Parkinson v. Lee, and continues:

"And in the case of Bluett v. Osborne, although Lord Ellenborough held that the seller was not responsible for a latent defect in a bowsprit which, upon being cut, proved to be rotten in the core, yet he expressly states his opinion that a person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold. And the decision of that case is consistent with that principle, when qualified by the reasons given in Parkinson v. Lee; for in both cases *the purchaser had as full an opportunity of judging of the quality of the articles purchased as the seller himself.*"

Randall v. Newson, L. R. 2 Q. B. D. 102, also referred to by Mr. Justice Harlan, was an action brought for breach of an implied warranty of fitness in the sale of a pole by the defendant, who was a manufacturer, for use in plaintiff's carriage. There was no provision in the contract for inspection and acceptance at the manufactory of the defendant, and while the plaintiff was driving his vehicle the pole broke owing to a latent defect, and damage to his horses resulted. It was held that the implied warranty of fitness on the part of the manufacturer entitled the plaintiff to recover his damages to the extent of the value of the pole and also for injury to his horses if it should be found that such injury was the natural consequence of the breaking of the pole from such defect. This is the case which Mr. Schouler in his work on Personal Property speaks of as extending the doctrine of implied warranty very far. It is to be remarked that Blackburn and Lush, judges in the Court below, ordered judgment to be entered for defend-

ant on the ground that the defect in the pole was a latent one, which no care nor skill could discover.

Brown v. Edgington, 2 Man. & Gr., 279, another case cited by Mr. Justice Harlan, *in the Kellogg Bridge Co. case*, was an action to recover damages for breach of warranty upon the sale of a rope sold by the plaintiff to the defendant. There was no inspection of the rope provided for in the contract made at the defendant's manufactory, but upon being tested at the plaintiff's place of business the rope broke. The plaintiff was held entitled to recover. The following passage from the opinion of Tindal, C. J., is quoted by Judge Harlan:

"It appears to me to be a distinction well founded, both in reason and on authority, *that if a party purchases an article upon his own judgment*, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but *if he relies upon the judgment of the seller*, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

In the same case, Erskine, J., says in his opinion:

"When a party undertakes to supply an article for any particular purpose, he warrants that it shall be fit and proper for such purpose. *If a purchaser himself selects the article*, it has been held that the mere fact that the vendor knows the use for which it is designed, will not raise an implied warranty, *because the skill and judgment of the latter are not relied on in making the purchase.* * * *

It has been contended that no warranty can be implied unless the seller is also the manufacturer. It is true that in Jones vs. Bright, the vendors were the manufacturers; and that fact was alleged in the declaration, and some stress laid upon it by the judges in their judgments. But it does not follow, because the Court attaches some weight to a fact which clearly makes a party liable, that such fact is a necessary ingredient in the case. Here the defendant did not make the rope, but he selected a person to make it, and had an opportunity of informing him of the purpose for which the article was wanted."

Maule, J., says in his opinion:

"I think that the effect of the circumstance of the vendor being also the manufacturer, is not very distinctly laid down in some of the cases. The way in which Abbott, C. J., put the point in Gray v. Cox, was, not that the liability of the defendant depended on his being the manufacturer of the article sold, but upon the fact of his knowledge of the purpose for which it was required, and that he must take care that it was of the proper description. Both in that case and in Jones v. Bright, the defendants might have performed their contracts by supplying goods of sufficient quality, although not of their own manufacture. So here, the defendant might have fulfilled his contract by getting a proper rope made; for it was not a necessary conclusion from what

passed that he was to make it himself. The foreman went the day after the order was given, and was then told that the rope was wanted to raise pipes of wine from the cellar, and that it must fit the crane, when he said that a rope must be made for the purpose. Not only was the defendant to make the rope, but to adjust it to the crane; and it is so alleged in the declaration."

In Jones v. Just, L. R. 3 Q. B. 197, in addition to the quotation made by Mr. Justice Harlan, the following passage is applicable to the case at bar:

"Where goods are in esse, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: Parkinson v. Lee, 2 East., 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory or if he distrusts his own judgment he may if he chooses require a warranty." * * * * * * * *

Mr. Justice Harlan also refers to the case of Hoe v. Sanborn, 21 N. Y. 552. This was an action to recover the purchase price of certain circular saws made by the plaintiff for the defendant, and the defense was a breach of warranty of quality. Selden, J., in delivering the opinion of the Court says:

"It is a universal doctrine, founded upon the plainest principles of natural justice, that, whenever the article sold has some *latent defect which is known to the seller*, but not to the purchaser, the former is liable for this defect, if he fails to disclose his knowledge on the subject at the time of the sale. In all such cases, where the knowledge of the vendor is proved by direct evidence, his responsibility rests upon the ground of fraud. But there are *cases in which the probability of knowledge on the part of the vendor is so strong*, that the Courts will presume its existence without proof; and in these cases, the vendor is held responsible upon an implied warranty."

After showing that the implied warranty of title upon the sale of goods rests upon the presumption of knowledge, the Judge continues:

"It is equally clear, that *implied warranties* in respect to quality, wherever they are held to arise, *rest upon a presumption, in the particular case, that the vendor knew of the defect.* * * * *

The theory of the civil and of the common law, in respect to these implied warranties, is entirely different. The civil law holds, that the warranty enters into and forms an integral part of the contract of sale itself, as will be seen by referring to Pothier's definition of a sale, and his statement of the obligation of the vendor to warrant against latent defects, which he deduces directly from that definition. The definition he gives seems to be somewhat strained for the purpose of embracing that obligation. * * * * * * *

But the common law, with, as I conceive, better logic, derives the obligation from the general doctrine which holds vendors responsible for every species of deception. * * * * *

It has already been shown, to some extent, that implied warranties as to quality, are based, when they exist at all, upon the same assumption (knowledge on the part of the vendor). But this will further appear from some of the exceptions to the common law rule of *caveat emptor*. * * * * * * * *

Another exception to the general rule, which has been recognized in several cases, but with some hesitation and uncertainty, is, that a manufacturer, who sells goods of his own manufacture, impliedly warrants that they are free from any latent defect growing out of the process of manufacture. In regard to the justness of this exception, it would seem, aside from authority, scarcely possible to doubt. If the vendor can be proved to have had knowledge of the defect, and failed to disclose it, all agree he is liable. Is it not reasonable to presume that he who made a thing which has a defect arising solely from the manner in which it is made, is cognizant of that defect? * * *

When a person, desirous to obtain an article for a particular purpose, but *not being himself skilled in respect to such article*, applies to one professing to be acquainted with the subject, or who, by his occupation, holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable, it is plainly to be inferred that both parties understand the purchase to be made upon the judgment and responsibility of the seller. In view of some such case, one or more of the English judges, at an early day, laid down the broad proposition, that, upon the sale of goods for a specified purpose, the law raised an implied warranty, that the goods sold were suitable for that purpose. * * *

But it is obvious that notwithstanding the goods are sold for a particular use, *if the purchaser himself understands what he wants, and selects such goods as he deems adapted to the intended use, there is no warranty*. There can, therefore, be no such general rule as that referred to; but *whether there is a warranty or not, must depend upon the circumstances of each particular case*."

After quoting the passage from the opinion of Tindal, C. J., in Brown v. Edgington, above set forth, Judge Selden continues:

"This extract shows that these are not cases of implied warranty in the ordinary sense of these terms. *The question is one of fact as to the actual contract between the parties. It is, on whose judgment and responsibility was the purchase really made.*"

Cunningham v. Hall, 4 Allen, 268, another case cited by Judge Harlan, was an action for damages for breach of warranty growing out of the sale of a ship made by the defendant and purchased by the plaintiffs. The Court says in the opinion:

"It is undoubtedly now a well settled rule, that if an article be ordered of a manufacturer for an especial purpose or a particular use, and he agrees to furnish it, and nothing is said by the parties as to the

materials of, or the manner in, which it shall be made, there is an implied warranty on his part that it shall be fit for that use. * * *

The whole doctrine as to implied warranties in matters of this kind, and the reason and limitations of it, are very briefly but accurately stated by Tindal, C. J., in the case of Brown v. Edgington, above cited. (Here follows passage from the opinion above quoted.)

And thus, where a person desires to obtain an article for a particular purpose, and, not being skilled in respect to such article, applies to one professing to be acquainted with the subject, or who by his occupation holds himself out to the world as understanding it, and the latter furnishes what he alleges to be suitable for it, it is plainly to be inferred that both parties understood the purchase to be made on the judgment and responsibility of the seller. (Citing Hoe v. Sanborn.) *But if a purchaser, or a person who orders an article of a manufacturer, judges solely for himself, and elects in what manner or of what materials it shall be made, there can be no such implication. If the thing ordered is afterwards to be manufactured, and he directs or assents that it shall be made in a certain form, shape or style, or upon a designated pattern, and it is made in conformity to such direction or assent, the manufacturer will not be responsible for any injurious consequence if it wholly fails to subserve the purpose for which it was designed, for his judgment and skill were not in such case relied upon by the other party.*"

Rodgers v. Niles, 11 Ohio St., 48, quoted from in the Kellogg Bridge Company case, was an action brought to recover damages for breach of warranty in the sale of certain boilers made by the defendants for the plaintiffs. Scott, J., in delivering the opinion of the Court, says:

"The general rule of the common law undoubtedly is, that upon an executed sale of specific goods, the vendor will not be held liable for any defects in the quality of the article sold, in the absence of fraud, or express warranty. Where the purchaser is not deceived by any fraudulent representations, and demands no warranty, the law presumes that he depends on his own judgment in the transaction and applies the maxim *'caveat emptor.'*" * * * * * *

Then follows this statement of the law quoted by Mr. Justice Harlan:

"The principal, if not the sole exceptions to the rule, are found in cases where it is evident that *the purchaser did not rely on his own judgment of the quality of the article purchased; the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor*, as where he agrees to furnish an article for a particular purpose or use."

The contract in the case at bar shows exactly the contrary.

* * * * * * * *

The following language in the opinion in the same case is significant:

"It is true that the warranty of merchantable quality has, in several cases, been held to be limited to cases where the examination is *impracticable*, and not merely inconvenient. (Citing authorities.) *So also the implication of warranty is said not to extend to cases where an examination, though practicable, would be fruitless on account of the latent character of the defects; but only to those cases in which there can be no examination.*

1 Parsons on Contracts, 466.

The contract sued upon was *executory* in its character. It was for the making and delivery to the plaintiffs, at a future day of three steam boilers, to be used in running the engines of their rolling mill. It must be clear that the rule of *caveat emptor* can apply in no such case, whether the contract be made with a manufacturer, or other person; for the purchaser can exercise no judgment in regard to the quality of a thing not *in esse*, or which is indeterminate, and to be thereafter selected or procured by the exercise of the vendor's sole judgment, discretion and will. Any rule must be unreasonable which would impute to a purchaser an intention to rely on his own judgment as to the quality of an article, where the circumstances of the case render it simply impossible for him to exercise any judgment whatever. * * *

Whether they (the boilers), were large enough to generate sufficient power for the use of the plaintiffs' mills, at Ironton, was a question upon which the plaintiffs might judge for themselves. They did so, and specified the dimensions; and for any defect in their judgment the defendants are not liable."

In Leopold v. Van Kirk, 27 Wis., 152, the following passage taken from the opinion, just before the sentence quoted by Mr. Justice Harlan, is worthy of remark:

"Our opinion is, that the express contract or warranty, if it be properly so called, is the very same which the law would have implied, or did imply, under the same circumstances, unless it was modified by the fact that the plaintiffs knew the hams were freshly packed, and therefore received them subject to any risks or defects arising from that cause, a point not necessary now to be decided, and which we do not decide."

In Brenton v. Davis, 8 Blackf., 317, cited by Mr. Justice Harlan in the Kellogg Bridge Co. case, the following facts appeared in the opinion of the Court:

"There was evidence tending to prove that the defendant was the builder or manufacturer of the boat; that the boat was purchased of him by the plaintiff, at a fair market price, for the purpose of transporting freight down *White* river and the other rivers, to the lower market, which purpose the defendant knew; that at the time of the contract, the boat was lying in *White* river partly filled with water and leaves, so that it could not be perfectly inspected; and that the defendant represented it to be a good boat."

In Chitty on Contracts, 11 American Ed., Vol. 1, page 632, cited by Judge Harlan, it is said:

"And the following may now be considered as the settled rule on this subject, namely: that if a man purchase goods of a tradesman, without in any way relying upon the skill and judgment of the vendor, the latter is not responsible for their turning out contrary to his expectation; but that, if the tradesmen be informed at the time the order is given, of the purpose for which the article is wanted; *and the buyer relies upon the seller's judgment*, the latter impliedly warrants that the thing furnished shall be reasonably fit and proper for the purpose for which it is required."

After referring to the foregoing authorities, the opinion of Mr. Justice Harlan in the Kellogg Bridge Co. case, then proceeds as follows:

"According to the principles of decided cases, and upon clear grounds of justice, **the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own.** * * * * * * * * *

But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. * *

When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to *latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller*, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

In the case at bar, the buyer did not rely upon the judgment of the seller, but upon his own. The contract so provided in express terms, and following out the contract, when the cars were ready for delivery, the defendant sent its inspector, who was an engineer and a cable railway man of experience, and its superintendent at the time, for the purpose of passing judgment upon the cars which had been made by the plaintiff and their fitness for use upon the defendant's 12th street line. Moreover, the finding of facts expressly negatives any contention which may be made that the latent defect in the brakes was caused by the process of manufacture and that reasonable diligence might have guarded against it, and that the plaintiff if it had used due care must have been informed of such defect during the process of manufacture. That this statement is true admits of no question for the very reason that the find-

ing of the Court is that the defect or inability in the brake "could not be discovered without a practical test on the defendant's railroad track or over like track, * * * * * and was only discoverable when put into use on the defendant's track or similar track. (p. 35).

Hence, the case of Kellogg Bridge Co. v. Hamilton, 110 U. S., 108, when applied to the contract and facts involved in the case at bar, is a direct authority in favor of the plaintiff.

Pope v. Allis, 115 U. S., 363, is another case upon which defendant relies with confidence, but that case is also clearly distinguishable from the case at bar, for in the contract between the parties in that case there was no provision for inspection and acceptance at the place of sale. There, certain iron was sold of a specified quality, which was not in existence or ascertained at the time. The seller undertook to ship it to a distant buyer. There was no inspection or acceptance before delivery to the carrier for shipment. It was held, and properly, that the buyer on the arrival of the iron had the right, if it was not of the quality required by the contract, to reject it and rescind the sale. The Court says in the opinion:

"It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. *The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract.* * *

The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and *the right to inspect implies the right to reject them if they are not of the quality required by the contract.*"

In the case at bar, the inspection which the defendant would have had the right to make on its line in Kansas City, under circumstances like those in the case of Pope v. Allis, the contract expressly provided should be made at the plaintiff's works and acceptance determined there.

Had there been such a provision in the Allis case and he had sent the superintendent of his works to pass upon the quality of the iron offered for delivery under the contract, and, after inspection, he had accepted the same, the decision, we respectfully submit, under the principles announced therein, would have been against him.

Heilbutt v. Hickson, L. R. 7 C. P. 438, is the case which the defendant considers decisive in support of the judgment of the Court below. The action was brought by the plaintiffs for a breach of contract by the defendants to supply a large quantity of shoes for the French army. The shoes were to be delivered free at Fenning's Wharf in

weekly quantities; to be inspected and quality approved before shipment: and payment to be made in cash at the time of each delivery.

A sample shoe was deposited. The plaintiffs appointed a person in the trade to inspect the shoes on their behalf; and several hundred pairs were rejected, but a large number were inspected and approved by him. On the inspection of the shoes, the soles were not opened, and it is not usual to open them, but without doing so it could not be ascertained of what the fillings of the soles consisted or whether there was paper in them or not. On the day of the first delivery, a statement had appeared in some of the newspapers that a contractor had been imprisoned in France for putting paper into the soles of the shoes. Some communication took place with one of the defendants upon the subject; and the evidence was contradictory as to whether the defendant had or had not said that there was no paper in the shoes, as far as he was aware. It was proved, however, that an agent for the plaintiffs, before the shoes were shipped to France, requested that a shoe might be cut open, to see if there was any paper in the sole, and that defendant's foreman assented to this being done, and stated that the plaintiffs might cut open as many as they pleased and would not find any paper in them. A sole of a shoe was accordingly cut open and no paper was found in it. The plaintiffs' evidence also went to show that many assurances were given on the part of the defendants that there was no paper in the soles of the shoes.

The plaintiffs then paid the defendants for the shoes which had been delivered by them at Fenning's Wharf, and forwarded them to Lille to be delivered to the French authorities. In the meantime the plaintiffs had forwarded one pair of the shoes to Mr. Ireland, the person with whom they were dealing at Lille; and this pair, having been opened by him, was found to contain pieces of paste-board box in the soles. A communication was made on the 9th of February to one of the defendants, who stated that it must be a mistake; and several more pairs of shoes were then opened and found not to contain paper. The sole of the sample shoe was at the same time opened, and it was found that this shoe did contain paper. The plaintiffs then stopped the further delivery of shoes by the defendants. At this time it was well known to the defendants that the shoes were required to be sent to Lille for the French army, and had to be passed by the French authorities, *after inspection there*, and that the sample shoe and the shoe sent to plaintiffs' representative at Lille had been found to contain paper in the soles; *and, after some discussion upon the subject, and as to the terms of the following letter, the defendants agreed to, and, eventually, on the 14th of February, signed the letter which bears date the 11th of February. By that letter, which is addressed to the plaintiffs, the defendants agreed to take back those shoes which might be thrown back on*

*their (the plaintiffs') hands, in consequence of paper being found in them, it being understood that they could not take back any large number of shoes if paper should be found in only a few pairs, and they stated their willingness that the closest inspection should be made. Upon this letter being signed and given to the plaintiffs, the inspection and delivery of the shoes were continued * and they were forwarded * * to Lille.* The total quantity thus forwarded to France was 12,225 pairs.

On the 26th of February, information reached England that some of the shoes had been found to contain paper; and on the 28th of February, upon the entire quantity which had been shipped being tendered to the French government, some were opened and found to contain paper, and the whole were rejected by the French authorities.

A considerable number of the shoes were opened at Lille, and many of them (in one instance seventeen pairs out of eighteen that were opened) were found to contain paper; and Mr. Ireland, thereupon told one of the plaintiffs, who was present when this was discovered, *that, in consequence of the defendants' letter of guarantee of the 11th of February,* he should take no further steps in the matter, and that he threw the goods on the defendants' hands.

The defendants were required to return the money for the shoes, and were told that the plaintiffs would hold them to the letter of guarantee.

There was also evidence on the part of the plaintiffs to show that, even independently of the paper, the shoes were not equal to the sample.

Upon the matters left to the jury, they found that the shoes delivered, and also those that were ready for delivery, were not equal to the sample, and that the defects could not have been discovered by any inspection which ought reasonably to have been made.

It had also been contended by the defendants that the letter of the 11th of February was not intended to be a binding agreement, but only to be shown to the French authorities; but the jury found that the letter was intended to be an undertaking by the defendants, in order to settle a bona fide dispute.

The defendants contended that the plaintiffs had accepted the goods, and were not at liberty afterwards to reject them; that the shoes consequently remained the plaintiffs' property and at their risk; and that the plaintiffs could only recover damages as for the breach of warranty. The plaintiffs, on the other hand, contended that they were entitled to reject the goods and to throw them on the defendants' hands at Lille, and that they were entitled to recover back the whole price that they had paid for them, as well as damages for the breach of contract, leaving the shoes the property of the defendants and at their risk.

Bovill, C. J., in delivering the opinion of the Court, says:

"If the case had rested on the original contract, we should have thought, as to the 12,225 pairs of shoes sent to France, that by the appropriation of these shoes by the defendants for the plaintiffs, the inspection and examination of them by the plaintiffs' agents, their being passed by those agents, the making out of invoices of the shoes so passed, debiting the plaintiffs for them as bought by the plaintiffs from the defendants, the delivery of them at the wharf, and the defendants having no further control over them, the plaintiffs paying the defendants the amount of the invoices and subsequently sending the goods as their own to France and causing the freight and duty to be paid on them, and tendering them to the French authorities under the contract of M. Potel, they must be taken to have accepted those shoes, that the property in them vested in the plaintiffs, and that they were not at liberty to reject the shoes and throw them back upon the defendant's hands. * *

The same rule would also in our opinion have applied to the small quantity of shoes which were approved, passed, and delivered, and paid for, and received at Fenning's Wharf. * * * * * * *

Upon the finding of the jury as to the letter of the 11th of February, it must, we think, be treated as a new additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that had arisen and were likely to arise with the French authorities at Lille; and, upon the proper construction of the whole contract, including the letter of the 11th of February, we are of opinion that the plaintiffs were entitled to throw back the shoes upon the defendants' hands at Lille, upon their being rejected by the French authorities, if a large quantity of them did in fact contain paper in the soles."

In the opinion of the Chief Justice, Byles J., concurred.

Brett, J., concurred in the judgment, but was of the individual opinion that the plaintiffs would have been entitled to recover under the original agreement aside from the letter of the defendants of the 11th of February.

That case, then, *without the letter of February 11th*, would have been decided differently by a majority of the Court, as to the shoes which had been inspected and delivered at Fenning's Wharf.

The case at bar has no such letter as one of its elements, and, upon the main facts, is much stronger in favor of the vendor than the Heilbutt case, for the judgment in that case might well have been upheld on the ground of fraud on the part of the vendor in putting paper into the soles of the shoes. Hence, the Heilbutt case, when properly analyzed, is also an authority for the plaintiff.

IV.

Where articles are ordered of a manufacturer, and a provision inserted in the contract that when the articles are made they shall be inspected and accepted by the buyer, the same rule obtains upon such inspection as in cases where specific articles are offered for sale. That rule is caveat emptor.

In the case at bar, the cars having been manufactured and appropriated to the contract by the plaintiff, and defendant having assented to such appropriation by accepting the same after inspection, they became its property upon shipment pursuant to its order, and plaintiff is not responsible for any defects that may thereafter have developed.

"Ordinarily, when the vendee has an opportunity of examining the commodity, the vendor is not answerable for any latent defect, without fraud or an express warranty, or such a direct affirmation, or representation, as is tantamount to a warranty."

Comyn on Contracts, pp. 143-4.

"Between ascertained specific chattels, and chattels which are not as yet fully ascertained, under a contract of sale, the line seems to be properly drawn at this day for admitting the principle of implied warranty as to quality; *the circumstance that the chattels' situation has not admitted of inspection by the buyer bringing it into the latter category.*

As to a specific ascertained chattel already inspected, *caveat emptor* as to quality applies in full force."

Schouler's P. P. (2nd Ed.), Sec. 346.

"Upon the sale of an ascertained article, such as a known machine, the component parts of which have been inspected by the buyer, there is, as it appears, *prima facie*, no implied warranty that the thing shall prove fit for the purpose for which it professes to have been constructed; certainly none if the machine was in running order at the time of inspection. * * * * * *

As to an existing specific chattel, whose actual condition is equally open to the inspection of either party, there is no implied warranty of quality."

Schouler, Sec. 347.

The same author, in Sec. 381, concludes his chapter on Warranty, with the following language:

"Implied warranty of quality appears to be, therefore, a doctrine by no means at variance with the policy of *caveat emptor;* it is rather the reasonable adaptation of that policy to emergencies; for still, as before, the subject matter delivered by the seller must be essentially that bargained for; while upon the buyer is ever cast the responsibility of taking heed, to the extent of his opportunity, that the thing which he means to purchase is worth all he agreed to pay for it. *It is only where the circumstances of the transaction are such that the buyer cannot be supposed capable of making an intelligent inspection of the thing at all, and discriminating as to its true qualities for himself, but must, instead, trust to the superior discretion and opportunities of the seller (the seller's vocation here importing particular skill or expert knowledge in supplying the thing wanted)*, or where the seller seeks to defraud, that the latest cases seem to depart from the old rule of *caveat emptor;* and this, after all, in order to give the particular transaction its just import, consistently with maintaining the general maxim."

Miller on Conditional Sales, Sec. 49, states the law as follows:

"The general rule is, that on a fair sale of personal property there is no implied warranty of quality. The rule in such case is *caveat emptor*, and the purchaser, in the absence of fraud, takes the risk of quality upon himself. If the specific chattel has a potential existence at the time of the sale, and is inspected by the purchaser, and the sale is free from fraud, the rule above stated has no exception." * * *

"*Where goods are open to inspection, and are actually examined before the sale, there is no implied warranty of quality, though the vendor may be the manufacturer.*"

In Blackburn on Contract of Sale (2d Eng. Ed.), under the title of "Subsequent Appropriation," it is said on pages 129-30:

"When the goods are selected from the first in the original agreement, there is, of course no difficulty on the point, both parties are then bound to apply the contract to those specific goods. **Neither is there any difficulty where both parties have subsequently assented to the appropriation of some specific goods to fulfil an agreement that in itself does not ascertain which the goods are to be. The effect is then the same as if the parties had from the first agreed upon a sale of these specific goods.** In the accurate language of Holroyd, J. (Rhode v. Thwaites, 6 B. & C., 388), the selection of the goods by the one party and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes. * * *

The general rule laid down by Lord Coke in *Heywood's case*, 2 Co., 36, and adopted in *Comyn's Digest*, Election, seems to be that when from the nature of an agreement an election is to be made, the party, who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice in order that he may perform his part of the agreement; *when once he has performed the act, the choice has been made and the election irrevocably determined.*" * * *

Under the contract between the parties in this case, after the cars were built the first act to be done was the inspection thereof by defendant.

"If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose. *For if the thing is itself specifically selected and ordered, there the purchaser takes upon himself the risk of its effecting its purpose.*"

Parsons on Contracts (7th Ed.), Vol. 1, pp. 586-588.

"Under a contract for the sale of goods not specific, in order to pass the title in severalty to the vendee, there must be an appropriation of particular goods to the contract; and this must be with the consent of the vendee express or implied."

Smith on Per. Prop., p. 168.

"Where the agreement is for the sale of goods to be manufactured the same rule applies as in the case of the sale of unspecified chattels; the contract is executory, and the title does not pass until the manufacture is completed and goods selected, separated and made ready for delivery. * * * * * * * *

Upon an appropriation of the finished article to the contract, the executory contract of sale becomes executed, as in the case of an appropriation of specific chattels, and title passes to the purchaser."

21 A. & E. Encyc. Law, 502-504.

In Deming v. Foster, 42 N. H., 165, the Court says on page 174:

"There is no implied warranty as to the quality of an article sold, nor of its fitness for any particular use, where there is a present sale of a particular existing article, then open to the examination and inspection of the purchaser, and when he requires no express warranty. * * *

If, says Chancellor *Kent* (2 Com., 478), there is no express warranty by the seller and no fraud, the buyer, who examines the article himself must abide by all losses from its defects, a rule which fitly applies to the case where the article was equally open to the inspection and examination of both parties, and the purchaser required no warranty of its quality."

In Mason v. Chappel, 15 Gratt. 572, the same doctrine is asserted on page 584 and 586 in the following language:

"If an order is given for an undescribed, unascertained thing, stated to be for a particular purpose, the vendor will be held liable, unless it answers in a reasonable degree the purpose for which it was purchased. But where a specific article is ordered and furnished, the law is well settled that, although the purchaser states the purpose to which he intends to apply it, there is no implied warranty on the part of the vendor that it is suitable for the purpose; and he will not, in the absence of fraud, or an express warranty, be held liable, however unfit and defective it may turn out to be. * * * *

There is then no reason to doubt that the plaintiff got the identical article that he ordered; and that he occupies 'the position of a man who has had the misfortune to order a particular chattel, on the supposition that it will answer a particular purpose, but who finds that it will not.'"

Goddard v. Binney, 115 Mass. 450, was a suit brought to recover the price of a buggy built by the plaintiff for the defendant. The buggy had been destroyed by fire while in the possession of the plaintiff, who was the manufacturer, but after it had been seen by the defendant and approved of by him. The Court says in the opinion:

"In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request was marked with his initials. It was neither intended nor adapted for the general market. * * * * * *

If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession."

In Atkinson v. Bell, 8 B. & C. 277, certain machines were ordered by the defendants to be made for them. Bayley, J., says:

"Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. * * * They were Sleddon's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within Rhode v. Thwaites, 6 B. & C. 388, and there would have been a complete appropriation vesting the property in the defendants."

Clarke v. Spence, 4 A. & E. 448, was trover for a ship built by plaintiffs upon an order given by defendants' assignor. One Howard was, under the contract, an inspector for the assignor to pass upon the

ship and its materials during construction, and had approved the same.

The assignor became bankrupt before the ship was entirely completed, but the plaintiffs were held entitled to a verdict. Williams, J., says in his opinion:

"On the part of the plaintiffs, it was not denied in argument, nor could be according to decided cases, * * * * and known principles of law, that, in general, under a contract for the building a vessel, or making any other thing not existing in *specie* at the time of the contract, no *property* vests in the party whom, for distinction, we will call the purchaser, during the progress of the work, nor until the vessel or thing is finished and delivered, or at least ready for delivery and approved by the purchaser. * * *

It seems to be clear that, as, by the contract, the vessel was to be built under a superintendent appointed by the purchaser, the builder could not compel the purchaser to accept any vessel not constructed of materials approved by the superintendent; *and on the other hand, that the purchaser could not refuse any vessel which had been so approved.*

* * * * * * * *

As soon as the last of the necessary materials is approved and added to the fabric, the vessel is complete; and, assuredly, the general property in the vessel must vest in the purchaser, nothing remaining to be done prior to the delivery; and this is agreeable to the current of all the authorities. * * * * * *

Now it is to be observed * * * that, when an actual delivery has taken place, payment is wholly immaterial to the vesting of the property; and, further, that, by the modern doctrine and the cases above alluded to, in order to vest the property in goods under contracts of sale, it is only necessary that the identical goods which are the subject of the contract should be ascertained, and the price fixed; and when these things are done, the general property vests by the contract before actual delivery; and the payment of the price is quite immaterial for that purpose."

Wilkins v. Bromhead, 6 M. & Gr., 963, was a case where the plaintiff had ordered a greenhouse to be built by Smith & Bryant, and after he had been notified that it was ready for delivery, had remitted the purchase price and directed the builders to keep it and take care of it until he sent for it. Possession of the greenhouse having been refused by the defendants, who were assignees of the builders, plaintiff brought trover, and a verdict in his favor was sustained by the Court.

Tindall, C. J., says in his opinion:

"There can be no doubt but that a contract for the making of a chattel does not of itself vest the property in the chattel, when completed, in the person giving the order. But here the question turns, not upon the original contract between the plaintiff and Smith & Bryant, but upon the circumstances which afterwards took place, viz., the payment by the plaintiff, after the greenhouse had been completed,

of the stipulated price, the appropriation and setting apart by the bankrupts of the greenhouse for the plaintiff, and his assent to such appropriation. There was an appropriation on the one side, and an assent to such appropriation on the other, which, I think, was quite sufficient to pass the property to the plaintiff. It may be that the original contract did not pass the property, but the parties may be said to have entered into a new contract. I cannot conceive why, under the circumstances of this case, *the property in an article made to order should not pass, upon its completion, as it would have done if it had been in existence at the time of the original contract.*"

Erskine, J., says:

"I am of the opinion * * * that the property in this greenhouse passed to the plaintiff. It is conceded on all hands that the rule laid down in Mucklow v. Mangles, 1 Taunt., 318, is the correct one, viz.: that, while the article remains unfinished no property in it passes, notwithstanding the vendor may intend it for the purchaser, or may put his name upon it, or otherwise show an intention to appropriate it, and that a payment of money on account makes no difference. Here, however, the greenhouse was completed, and after it was so completed the makers appropriated it to the purchaser. *The latter, before paying* for it might have required to see it; but, instead of doing so, he transmitted the price. But that is not all: he also required the bankrupts to keep the greenhouse for him, thereby assenting to the appropriation which they had made."

Maule, J., says:

"There seems to me to have been a complete appropriation on the part of the vendors, and an assent thereto on the part of the purchaser. * * * * * * * * * * *

In these cases it is not necessary that the vendee should actually see the article when completed, provided there is sufficient to show that the identical thing offered or appropriated by the one party is accepted and assented to by the other, as made in performance of the contract."

Cresswell, J., says:

"The first point comes very much to this—*whether the contract was not in effect an agreement for the sale of a specific chattel*, for although, in the first instance, the bankrupts contracted to build the greenhouse for the plaintiff, after the article was finished, there was an appropriation of it to the plaintiff, and a clear assent on his part to such appropriation. I therefore think the property passed to the plaintiff."

Young v. Matthews, L. R. 2 C. P., 127, was a case where three brick-kilns, one of finished brick, one still burning, and one moulded but not burnt, were sold to one Northen by plaintiffs' assignor, one Maxon. Northen had accepted large bills for the assignor, and being unable to pay, these brick-kilns were appropriated to Northen's use. Northen's agent went to his "brick field," where the kilns were pointed

out by Maxon's foreman, who agreed to hold and deliver them to Northen. The assignee brought trover against the defendant to whom Maxon had sold them. Verdict for defendant.

Erle, C. J., says:

"There is no doubt that the parties could pass the property in all the bricks, whether finished or not, if such was their intention; and what passed amounted to this: Northen's agent said, Are all these appropriated to my principal? And the seller's agent said, Yes."

Byles, J., says:

"This is not like a sale of unascertained goods; the goods were ascertained and pointed out, though not finished; and it appears to have been the intention of the parties that the property in them should pass to Northen."

In Heilbutt v. Hickson, L. R. 7 C. P., 438, already referred to, Bovill, C. J., in delivering the opinion of the Court says on pages 449-50:

"In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself: **but where certain goods have been selected and appropriated and assented to by the buyer, then the case stands, as to the vesting of the property very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of some kind before the property would be considered as intended to pass, and upon that taking place the property might pass if it was intended to do so, equally as in the case of a contract for specific and ascertained goods.** Lord Wensleydale, in the case of Dixon v. Yates, 5 B. & Ad., 340, put the case of the sale of a specific chattel upon the same footing as the sale of an unascertained chattel after delivery, for the purpose of showing that the property vested in the latter case upon delivery, and in the former by the contract itself."

V.

The validity of the contract is not challenged by defendant. The force and effect of the provision as to inspection and acceptance at the plaintiff's works cannot be successfully denied. The defendant seeks to escape therefrom by alleging in its answer that the contract was afterwards changed for a consideration, so that the place for inspection was not to be at the plaintiff's works at Pullman, Illinois, but on defendant's line at Kansas City, Missouri. No such change in the contract was ever made, nor is there any proof thereof in the record, and the finding of facts is absolutely silent in regard thereto.

That defendant felt compelled to make such allegation in its answer shows that it realized that under the contract as originally made the implied warranty of fitness was excluded, and that it was bound to pass upon the quality of the cars, finally and conclusively, while they were at the plaintiff's works. The finding of facts shows that this was exactly what it did, and there being no modification of the contract, its inspection there covered all defects, both latent and patent, and no legal right of recourse to the plaintiff was left for any trouble with the cars which afterwards developed.

"The warranty must be made during the treaty; and a warranty made after the sale is complete, or the contract performed, will not be binding for want of consideration."

Chitty on Contracts (11th Am. Ed.), Vol. 1, p. 646.

Comyn on Contracts, in speaking of warranties, says on page 145:

"The warranty must be *upon the sale*, for if it be made after and not *at* the time of the sale, it is a void warranty: for it is then made without any consideration; neither does the buyer then take the goods upon the credit of the vendor. The warranty must not only be upon the sale, but it must also be one of the terms of the contract of sale. * * * * * * A warranty, if made after the sale, must be upon a new consideration, and distinct from that of the sale itself. Nor can a warranty, express or implied, be created after a sale is made by any acts, expressions or representations of the vendor, *unless some new consideration be given for the warranty.*"

"Where a written agreement exists, and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement, he must clearly show,

not merely his own understanding as to the new terms of arrangement, but that the other party had the same understanding."

Darnley v. The Proprietors, etc., 2 L. R. H. L., 43, 60.

Perkins v. Bell, The Reports, 1893, 4 Q. B. App. 212, was an action for goods sold and delivered. The plaintiff sold barley by sample to the defendant, under contract providing for delivery at Theddingworth Station. The defendant on the same day resold the barley by the same sample. The defendant, on hearing of the arrival of the barley at the station, directed the Station Master to forward him a sample; and after inspecting the sample, ordered the Station Master to send on the barley to the sub-vendees. The defendant subsequently rejected the barley as inferior to sample.

A judgment in favor of defendant was reversed on appeal. Lord Justice A. L. Smith, in delivering the opinion of the Court, says:

"It will be noticed that by the contract the plaintiff was to deliver the barley at Theddingworth Station. No other destination was known to him, and we cannot doubt that if this had been a sale of specific ascertained barley, the property therein would have passed to the defendant upon its delivery to the railway company at the station by the plaintiff. The railway company would thereupon have become the agents of the defendant to receive it and to carry it to any place or places the defendant might direct. But it was said by counsel for the defendant, that, inasmuch as this was a sale by sample, the defendant was entitled to a fair opportunity of comparing the bulk with the sale sample after delivery, before the property in the barley passed to him, and that the place for inspection need not necessarily be the place at which the delivery is to be made; and in this we agree. The question, however, is if there can be read into this contract an implied term that the inspection was to be had at any place fixed by the vendee without the knowledge of the vendor. * * * * * * *

We find no evidence in this case to dislodge the presumption which *prima facie* arises, that the place of delivery is the place of inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation, when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees, living in different places at different distances from Theddingworth Station, and until arrival at these places the barley would be at the risk of the vendor. If the barley was rejected by these sub-vendees upon arrival, the vendor would have at his own risk and cost to take the barley back from whatever places it might happen to be in, no matter how far they might be from Theddingworth Station, or to arrange for its sale at the places where it then was. As to these risks the contract is wholly silent, and in our judgment it is impossible to read into it that the vendor undertook these risks, as we were invited by the respondent to do. * * * * * *

When the defendant took possession of the barley at the station and ordered it to his sub-vendees, the property in the barley passes to him,

and his right of rejection was then gone. For these reasons we think the plaintiff is entitled to judgment."

In Hansbrough v. Peck, 5 Wall., 497, where a subsequent oral agreement varying terms of original written contract was claimed, the Court, through Mr. Justice Miller, says:

"But the true answer to this part of the case is, that the arrangement was not in writing, nor any consideration passing between the parties that could give validity to it."

VI.

The defect or "inability" which was afterwards found in the cars, as shown by the finding of facts, was one which the plaintiff could no more ascertain either in the manufacture of the cars or in the kind of inspection that was made than the defendant: the same opportunities for discovery were open to both: it resulted from the peculiar character of the defendant's road, its steep grades and sharp curves. Hence as to such defects, defendant had no right to rely upon the judgment of the plaintiff, in face of the provision which required the exercise of its own judgment at the plaintiff's works.

The cases already cited show that a manufacturer is held liable on the ground that by the exercise of due care in the making of the article he might have discovered the defect which afterwards developed. The finding of the Court below expressly negatives the discovery of the defect by anybody except after an actual test upon defendant's Twelfth street track in Kansas City or similar track.

VII.

If, however, the nature of the defect or inability in the brakes is open for consideration on account of its having been defined by the Court below, although denominated latent, we respectfully submit that it was one which could have been discovered by inspection and test, if proper care had been exercised, or if proper facilities had been called for and used by defendant's superintendent and inspector.

The Courts all agree, even those which take the most extreme view of the doctrine of implied warranty in favor of the buyer, that where discovery of defects is possible there inspection binds. The question of difficulty and expense is beside the case. If defendant's inspector had made a more careful examination of the cars as they stood, or had built or required plaintiff to build a temporary track with the maximum grade and the sharpest curve found on its Twelfth street line, the defect or inability in the brake would have been disclosed, and, if not satisfactorily remedied, its right of rejection on account thereof would have been clear. Or if its inspector had demanded that such track be provided for the purposes of test, and plaintiff had declined to build it, defendant might, perhaps, have refused to accept the cars on account of the inability of its inspector to pass upon their fitness.

Neither of these things was done. Defendant's inspector examined them as thoroughly as he desired; he subjected them to all the tests he wished; he called for no additional facilities; he pronounced them satisfactory, and ordered them to be shipped. The defendant exercised its right to determine whether the cars complied with the contract; and having accepted the cars after inspection, it could not thereafter legally reject them and ought not to be permitted to defeat an action for their purchase price.

"It is elementary law that when the contract is to do a thing which is possible in itself, * * * the promisor will be liable for a breach thereof, notwithstanding that it was beyond his power to perform it; for it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract."

1 Chitty on Contracts, 11th Am. Ed., 1074.

"An agreement is not void merely by reason of the performance being impossible in fact. * * * * * *

A thing is not to be deemed impossible merely because it has never yet been done, or is not known to be possible. * * * For example, a man agrees to make a flying machine and warrants that it shall fly. This may well be a good contract. It is true that no one has yet succeeded in making such a machine. But the difficulties, great as they are, consist in details; it is a question of weight and strength of materials, disposition of parts and application of power. * *

If a man may bind himself to do something which is only not known to be impossible, much more can he bind himself to do something which is known to be possible, however expensive and troublesome."

Pollock on Contract, pp. 352–5.

Hyatt v. Boyle, 5 Gill. & J. (Md.) 110, was the case of a sale of certain kegs of tobacco of a particular brand, made at the plaintiff's counting room, where the tobacco was, without examination by either party. A part of it proved unsound, and after holding that that fact constituted no defense to an action for the purchase price, the Court says:

"It was urged, too, that from the nature of the article, and the manner in which the purchases of it are made, the appellant had no opportunity of inspection, and that therefore the seller impliedly warranted its quality. But this exception to the general rule of *caveat emptor* does not apply to cases circumstanced like the present; but to those where the examination at the time of sale is, morally speaking, impracticable, as where goods are sold before their arrival or landing. *The mere fact of the inspection being attended with inconvenience or labor, is not equivalent to its impracticability.* If the purchaser desire to avoid it and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality."

Neaffie v. Hart, 4 Lansing, 4, was an action to recover part of the purchase price of a steam boiler made and delivered by the plaintiff to the defendant under a contract therefor at a stipulated price. The boiler was received by the defendant and built into his boat for immediate use in such manner that a removal would cause great injury to the boat. Afterwards, upon the application of tests, it was found to vary materially from the specifications. But defendant did not offer to return the boiler or notify the plaintiff to take it back, and claimed that he was excused from so doing on account of the difficulty thereof and the injury which would be caused to his boat thereby. The evidence of the inferiority and unsuitableness of the boiler was rejected. The Court says in his opinion:

"It is always easy to suggest cases of hardship, and occasions for excepting such from the operation of the general rule; but courts cannot act upon any such general principle without endangering the stability and certainty of all rules and the foundations upon which the most common rights rest. It is said that the defendants here could not return the boiler after the defect was discovered, nor reasonably offer to return it, as such return would necessarily involve the tearing up and

partial destruction of their boat. But whose fault was that? Certainly not the plaintiff's. They had ample opportunity to examine and test the boiler before putting it into their boat. At least, the offer does not show that they had not, and the presumption is, they had. If they saw fit to forego this opportunity, it was at their own risk, and not at the risk of the plaintiff. The boiler was delivered by the plaintiff as a fulfillment of his undertaking, and accepted as such by the defendants. That acceptance is binding and conclusive, until the defendants place themselves in a situation to be relieved from it, which they have never done. The fact, if such exists, that the proper examination, at the time of the delivery, would be attended with great inconvenience and difficulty, is of no consequence. The party accepting is not excused, unless such inspection is altogether impracticable, as was expressly held in Hart vs. Wright, 17 Wend., 275."

Hart v. Wright, 17 Wend., 267, was an action for breach of warranty in the sale of 315 barrels of flour bought by the plaintiff, who was a starch manufacturer, who discovered after the purchase that it was made of "grown" wheat, which rendered it unprofitable to be made into starch. It was held that there was no implied warranty that the flour was fit for all the ordinary purposes for which flour is used. The Court says in the opinion:

"This doctrine, too, that an implied warranty arises from *difficulty of inspection*, seems to me to have been properly brought within very narrow bounds by a recent and well considered case, Hyatt v. Boyle, 5 Gill & John., 110. The sale was of 24 kegs of tobacco, branded with Parkins' crooked brand, known to be a very fine one; but the tobacco proved to be rotten, and utterly unsalable for ordinary use. The vendor knew it was intended for sale; it was insisted that the circumstances implied at least a warranty that the tobacco was merchantable, on the authority of the late English dicta, which it was said the Court had approved in a previous case, in which they had also sanctioned the same implication, from the buyer having no opportunity of ascertaining by inspection the quality of the article. The Court deny having sanctioned the English dicta; and as to wanting opportunity for inspection, they remark, that the exception arising from the rule of *caveat emptor* from that cause does not apply to cases circumstanced like the present, but to those where the examination at the time of sale is, morally speaking, impracticable—as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor, is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality.' The case is applicable to the present in every view; and I confess that I am unable to see the reason for relaxing even thus far. Why not demand a warranty of the goods not yet arrived? Where is the exception to terminate? If we put ourselves upon difficulty, I know not what may eventually be brought within it. Everything demanding peculiar skill, in order to ascertain its quality, comes, for aught I see, equally within the reason of the exception; and in respect to some dealers, it is hardly possible to name any article of merchandise which will not,

under circumstances, though present and within view of the purchaser, come in for this implied warranty. Take the Maryland restriction to moral impracticability; and, I ask, what is more impracticable than for the purchaser of a horse to discover certain diseases, or the purchaser of a ship its secret defects? It is many times absolutely impossible; yet we confine the vendee to an express warranty. By keeping within the pale of our own authorities, as in duty bound, we avoid at least a pilgrimage of litigation, if not a total subversion of the common law rule."

VIII.

Not only were the inspection and acceptance of the cars by the defendant at the plaintiff's works complete, but their delivery by plaintiff free on board the cars effected a perfect transfer of the title to the defendant. The cars thereby became its property. It paid the freight thereon. Any risk of loss or of their proving unsatisfactory thereafter, was upon the defendant.

In Browne v. Hare, 4 B. & Ad., 822, the defendants, merchants at Bristol, through a broker contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam. Erle, J., says in the opinion:

"The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to; and under that we think the property passed when the goods were placed 'free on board,' in performance of the contract."

In Stack v. Inglis, L. R. 12, Q. B., Div. 564, which involved the question whether the buyer had an insurable interest in certain goods, Brett, M. R., in construing the meaning of the words "free on board," uses the following language:

"Now if the goods dealt with by the contract were specific goods, it is not denied but that the words 'free on board,' according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped, and in that case the goods so put on board under such a contract would be at the risk of the buyer whether they were lost or not on the voyage."

Baggallay, J., says in his opinion:

"It has not been denied that, where the contract deals with specified goods, the introduction of the provision that they are to be 'free on board' places the goods at the risk of the buyer."

The Mary and Susan, 1 Wheat., 25, was the case of a purchase of some goods by G. & H. Van Wagener of New York from some parties in Birmingham, England. They were ordered forwarded to Liverpool, and from there ordered shipped to New York. The controversy arose over the question as to whom the title was vested in at the time the ship was captured.

Marshall, C. J., says on page 39:

"If the goods were shipped in pursuance of the orders given by G. & H. Van Wagener, the delivery on board the ship was a delivery to them, the property was vested in them by that act, and they had no election to accept or reject it."

In Halliday v. Hamilton, 11 Wall., 560, the Court says, on page 564:

"As soon as the corn was deposited with the common carrier, who was the bailee for the purpose, the title to it and right of property in it was changed and vested in Hamilton & Duncan, to whom it was to be delivered. This is the effect of all the cases on the subject."

A large number of cases are cited in support of the proposition.

IX.

Upon inspection, acceptance and delivery of the cars, plaintiff's right to the purchase price under the contract was clear and unquestionable.

If before the cars had reached Kansas City, suit had been instituted by the plaintiff to recover the same and had come on for trial, defendant could have interposed no valid legal defense thereto. Judgment therefor would have been inevitable. Whatever happened after the cars arrived at Kansas City cannot be used as a legal defense to, or in avoidance of, an absolute liability for the purchase price, which became fixed the moment the cars were inspected and accepted and delivered free on board. If the price had actually been paid, will defendant contend that it would have the right to recover it back?

X.

The defense in this case rests upon the implied warranty of the plaintiff as the manufacturer of the cable cars that they were reasonably fit for the purposes for which they were made, viz: To be successfully operated on defendant's Twelfth Street cable line, which warranty, it is claimed, survived the inspection and acceptance by defendant at plaintiff's works.

But even if this be a good defense, which under the terms of the contract and the conduct of the parties in this case is denied, it did not justify the defendant in rejecting the cars, but would only have entitled it to recoup its damages in defense of this suit, the measure being the difference between what the cars were worth if they had been fit for the purpose for which they were made, to-wit, the contract price, and what they were actually worth in the condition in which they were, or, which is the same thing, what it would cost to put them into proper condition.

The title to the cars had passed irrevocably. The contract which was originally executory became completely executed when the cars were made, presented for inspection and acceptance to the defendant's superintendent and inspector, and approved and accepted by him, and delivered f. o. b. to the carrier, the defendant's agent in that behalf, at Pullman Junction or Kensington or Chicago. The contract provided for no subsequent right to inspect and reject after a trial upon defendant's line at Kansas City. If a warranty of fitness on the part of the plaintiff as the manufacturer of the cars existed at all under the contract, which we deny, or if it continued after the action of defendant's duly accredited representative in inspecting and accepting the cars, which we also deny, it did not give the defendant a right to reject the cars, but, at most, a right of recoupment, which its counsel asserted at the trial below they did not claim in this action.

This doctrine is not only well established by the general current of American and English authorities, but has been distinctly announced by this Court.

Thornton v. Wynn, 12 Wheaton, 183, was an action for the purchase price of a race horse, which the defendant sought to defeat by proof of a breach of warranty of the horse's racing qualities and pedigree, and an offer to return him to the plaintiff. The Court below instructed the jury, at the prayer of the plaintiff, that if they should be

of opinion from the evidence that the horse was, at the time of the sale, utterly unsound and broken down, and had been broken down whilst in the plaintiff's possession, and was wholly unfit for and incapable of the action and fatigue necessary to a race horse, but that the said facts were not known to the plaintiff at the time of the sale, the said facts are not a sufficient defense in the action to prevent the plaintiff from recovering. This Court, after reviewing the authorities bearing upon the legal proposition asserted in this instruction, concludes as follows:

"The result of the above cases is this: If, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defense to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received in case the purchase money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, conditionally, to take back the property, because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other. *But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time.* We are, therefore, of opinion that the direction of the Court in this case, upon the second exception was entirely correct."

The finding of facts in the case at bar distinctly negatives all knowledge on the part of anybody of the defect in the cars, by stating that it was only discoverable by a trial on the line of the road itself.

The question also arose in Lyon v. Bertram, 20 Howard, 149. The Court quotes from the note to Cutter v. Powell, in Smith's Leading Cases, where the annotator says:

"It is settled by Street v. Blay, and Paulton v. Littimore, where an article is warranted, and the warrantee is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all. 2. He may receive it, and bring a cross action for the breach of the warranty. 3. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price." * *

The Court then proceeds as follows:

"The second and third propositions of this learned author are indisputable, and have received the sanction of this Court. * * * The first proposition, concerning the right of the purchaser to reject the article because it varies from the warranty, is an open question. In

Dawson v. Collins, 10 C. B. R., 527, (70 E. C. L. R.) the judges dissent from it. The Chief Justice expressed his favor for the conclusion, 'that the buyer has no right to repudiate the article' because it did not correspond to the warranty; and Creswell, Justice, said, 'where the rule is of an individual and specific thing, the vendee can only defend himself, altogether, against an action for not accepting it, if the thing be utterly worthless, as in Poulton v. Littimore, or, in part by giving the breach of warranty in evidence in reduction of damages.' And this corresponds with the conclusions of this Court in the case of Thornton v. Wynn, 12 Wheat., 183, where very similar language is used."

There is no claim in this case that the cars were utterly worthless. On the contrary, one of the findings is to the effect that the brake on the Laclede cars, which presumably worked satisfactorily, only cost from $75.00 to $100.00, and it is a legitimate inference that plaintiff's cars could have been successfully operated with that brake applied.

The correctness of the doctrine announced in the foregoing cases was recognized in Pope v. Allis, 115 U. S., 363, 373.

In Sedgwick on Damages, 8th Ed., Sec. 762, it is said:

"That in an action brought on a warranty, the true measure of damages is the difference between the value which the thing sold would have had at the time of the sale if it had been sound or corresponding to the warranty, and its actual value with the defect."

The same author says in section 764:

"The rule of avoidable consequences applies here as elsewhere, and if the defect can be remedied the cost of so doing is the measure of damages."

In March v. McPherson, 105 U. S., 709, the question arose as to the proper measure of damages upon breach of warranty as to the condition of certain machines. This Court approved an instruction of the Court below to the effect that "the extent of the damages in this case will be the difference that it would cost to put the machines in good condition." It is also stated in the opinion that "where the articles delivered are not what the contract calls for, as in the case of defective machines, the measure of the vendee's damages is what it would cost to supply the deficiency without regard to the contract price."

In Stillwell Mfg. Co. v. Phelps, 130 U. S., 520, Mr. Justice Gray, in delivering the opinion of the Court, says:

"The principal position taken in the argument for the plaintiff is that the defendant, having received and retained the machinery furnished under the contract sued on, was bound to pay the contract price; and in support of this position cases were cited, holding that under a contract to manufacture or to furnish a chattel satisfactory to the pur-

chaser, the purchaser, *if he takes possession of and uses it*, thereby conclusively accepts it as satisfactory, and binds himself to pay the whole contract price. * * * * * * *

The plaintiff's agreement was not for a sale of the machinery, subject to a condition that it should be satisfactory to the purchaser. But it was an agreement, not only to furnish machinery of a certain description and quality, but also to set it up and put it in complete operation in the defendant's mill. The machinery was to be erected on the defendant's land and made part of his mill and one instalment of the price was to be paid on the delivery of the machinery there, and before the plaintiff had completed the work to the satisfaction of the defendant. In such a case, it would be most unreasonable to compel the defendant in order to entitle him to avoid paying the whole contract price, or to recover damages for the plaintiff's breach of contract, to undergo the expense of taking out the machinery, and the prolonged interruption of his business during the time requisite to obtain new machinery elsewhere. The rule of damages, adopted by the Court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, is the only one that would do full and exact justice to both parties, and is in accordance with the decisions upon similar contracts."

On the subject of remedy upon breach of warranty, Smith on Mercantile Law (Pomeróy's Ed.), says in Sec. 605:

"Where the vendor has bound himself by a warranty, either express or implied, the vendee may * * * * * use the breach of that warranty as evidence, in reduction of the vendor's claim for compensation, or may bring an action thereon against him. But he cannot, if he have received the article, return it, and recover the price as money paid on a consideration which has failed, unless there have been a condition in the contract authorizing such return, or the vendor have received back the chattel, and thereby consented to rescind the contract, or been guilty of a fraud, which destroys the contract altogether."

Blackburn on Sales, says on page 495:

"Having considered the position of the parties where the vendor has not tendered the goods, the next question is what are their rights where the vendor does tender. It will be convenient to examine in the first place those cases in which *the property in the goods has passed to the vendee. In that case he cannot return them.* After accepting them so that the property in them has passed to him, he cannot, when he comes to examine them and discovers that they are not what he contracted for, call upon the vendor to take them back again."

The same author says on pages 500-1:

"If the contract was not a sale of an ear-marked chattel, and was an executory one so that the property in the goods did not pass at the time of the contract, then the vendee may refuse to accept them when

tendered, if they are not such as the vendor warranted they should be. If he accepts them, then, as before, he cannot return them, but has his remedy in an action for damages."

In the case at bar, the cars were tendered, according to the contract, at the vendor's works, and were accepted there by the vendee, after actual inspection.

Leake on Contracts, lays down the law as follows:

"Upon a sale of a specific chattel vesting the property in the buyer, with a warranty of quality, a breach of the warranty does not entitle the buyer to return the chattel and re-claim the price paid as upon a total failure of consideration; the remedy is by action upon the warranty. * * * If the price have not been paid and the buyer be sued for it, he may claim a reduction by reason of the breach of warranty; or he may pay the price and maintain a separate action upon the warranty." (p. 111.)

"Where the contract for the sale of specific goods is made with a warranty, the buyer is not entitled to avoid the contract, and to refuse or return the goods, upon a mere breach of the warranty as he is in the case of the contract having been induced by fraud." (p. 405.)

"So if specific goods are sold by sample, with a warranty that they are equal to sample, the buyer cannot avoid the contract merely on the ground that they do not correspond with the sample, without an express condition enabling him to do so; but in the absence of fraud, he must resort to the remedies for breach of warranty." (p. 406.)

"After an acceptance of the goods under the contract, the description ceases to be available as a condition and becomes a warranty in the narrower sense of the word, namely, a stipulation for breach of which a compensation must be sought in damages." (p. 409).

"As to the quality of the goods to be delivered: a contract of sale of a specific chattel is performed by the delivery of the chattel sold, whatever may be the defects in it. The seller is not responsible for defects in the chattel, unless he has fraudulently concealed them, or has warranted against them. Fraud may entitle the buyer to rescind the contract; but a mere breach of warranty does not entitle him to refuse or return the chattel, unless he have stipulated in the contract for the right so to do, or have made the contract conditional upon the warranty; it only gives a claim for compensation for the defect warranted against." (p. 825).

In Getty v. Roundtree, 2 Chand. (Wis.), 28, the Court says, on page 43:

"Where there is a warranty, and no fraud, the vendee is not entitled, against the will of the vendor, to return the article and recover back the price paid. (Citing authorities.) His only remedy is by a suit for damages, or by recoupment, in case of an action for the purchase money."

In Kase v. John, 10 Watts (Pa.), 107, it is said in the opinion:

"If the sale be absolute, and there be no subsequent consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action on the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it in a reasonable time." * * * *

"The vendor was as much, and no more, bound to repair the machine as any other person would have been, and if there was any unreasonable delay in repairing it, the remedy is another way, and not by considering it as equivalent to a consent to rescind the contract, and thereby enable the vendee to consider the contract at an end. * *

It was doubted whether there be a difference between the manufacturers in this respect and other vendors, that the former might be presumed to know it was unsound, although such a presumption does not arise as to others. But I perceive no warrant for the distinction in this particular in any of the cases, and we think it would be mischievous to visit him with the consequences of fraud, from a presumption which, in numerous cases, would be at war with the truth."

Parsons v. Sexton, 4 M. Gr. & S., 899, was a case where the plaintiff sold "a fourteen horse engine which had been inspected by defendants' foreman and after delivery at the defendants' works, the plaintiff was unable to work it up to fourteen-horse power, and defendants rejected it. Upon a suit brought for the purchase price, and a verdict for defendant, the case was reversed on appeal.

Wilde, C. J., in delivering the opinion of the Court, said:

"Upon this state of facts we think that the defendants bargained for and bought the specific engine which was afterwards erected on their premises, and, assuming that there was a warranty as to its power, and that the warranty was broken, that was no answer to the action. * *

The defendants, then, could not reject the engine because it was not of fourteen-horse power; and the direction of the learned Judge in that respect was wrong. But we think that the plaintiff cannot have a verdict for £117. 7s. 6d. entered in his favor, for the defendants may give evidence of the alleged warranty, and the breach of it, in reduction of the price agreed to be paid."

XI.

Defendant did not try the cars on its line, solely, for the purposes of a test. It knew that it had no right so to do under the contract. The cars had already been tested and accepted and had become defendant's property. When its line was opened, it put them into service. When the brakes proved defective, it called upon plaintiff---not to take back the cars---but to *repair* the brakes, and it attempted to *change* and improve them itself.

Hooper v. Story, 29 New York Supplement, 639, was an action brought to recover the purchase price of a varnishing machine made and sold by the plaintiffs to the defendants. The defense was based upon the breach of warranty of quality, and judgment for the plaintiffs for the full amount of the purchase price of the machine rendered by the referee was affirmed by the Supreme Court. Bradley, J. in delivering the opinion says:

"As one of his conclusions of law, the referee found and determined 'that the defendants, by retaining possession of the machine, using the same and deriving profit therefrom, with knowledge of its imperfections and incapacity, as well as making repairs and alterations thereon, accepted the machine, and became liable to pay therefor."

XII.

Plaintiff's response to defendant's call to *repair* the brakes was purely voluntary. It neither created nor recognized any legal liability to make the cars good.

It was the natural reply of a reputable manufacturer to one of its customers, whose good will and future business it desired to retain. Ordinary business courtesy inspired it. The prestige of the plaintiff company in desiring to supply cars which would work satisfactorily was a sufficient inducement to the immediate sending out of its skilled men to see what could be done. For all this there was no consideration which the law recognizes as valuable. What was done did not affect in any way the contract between the parties. That was not changed or modified. Under that contract the right of plaintiff to its purchase money for the cars was just as absolute after its efforts to make the brakes work satisfactorily as before.

XIII.

The interpretation which the parties themselves put upon the contract shows that they both considered that the title to the cars had passed, and that the plaintiff had a right to the contract price.

The plaintiff referred to the delivery of the cars and made a specific demand for its purchase money by the letter of its General Manager of April 5th, 1888. (p. 31.)

Defendant, by the letter of its President dated April 11th, 1888 (p. 32), clearly recognized the fact that the cars were its property, and that the contract price therefor was due, less a possible deduction for repairing the brakes, provided it had to make these repairs itself. This letter announced the opening of its line and the *operation* of the cars, which means the putting them into *service*. It showed not a *test* of the cars but a *use* for its own purposes. It did not show a rejection after trial, but changes and repairs made by itself upon its own property. These having proved unsuccessful, it proposed, not a rejection of the cars as the property of the plaintiff, but either the making of the necessary changes and repairs by the plaintiff, or the doing of the work itself and deducting the cost thereof from the purchase price. The alternative submitted by the defendant was an unequivocal recognition that the title to the cars had passed, and that all it wanted was either to have plaintiff change and repair the brakes or that the purchase price should be diminished by what it might cost the defendant itself to make the brakes operate successfully. The whole tone of this letter is entirely inconsistent with defendant's present claim of a right to reject the cars as the property of the plaintiff after an actual test on the line. It can only be interpreted to mean that it then regarded that the original contract was still in force, that the inspection and acceptance of the cars at plaintiff's works and their delivery free on board at Pullman Junction or Kensington had made them its property.

In Fisher v. Samuda, 1 Camp. 190, Lord Ellenborough says on page 193:

"It was the duty of the purchaser of any commodity immediately upon discovering that it was not according to order and unfit for the purpose for which it was intended, to return it to the vendor, or to give him notice to take it back."

In Maberly v. Sheppard, 10 Bingham, 99, the Court says:

"If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance." * * * * *

In Chapman v. Morton, 11 M. & W. 539, Lord Abinger said:

"If the defendant intended to renounce the contract, he ought to have given the plaintiff *distinct notice at once* that he repudiated the goods. Instead of taking this course, the defendant had exposed himself to the imputation of playing fast and loose, declaring in his letters that he would not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs."

In the same case Parke, Baron, said: "That there was good evidence to show that the defendant did accept the goods, and that he could not afterwards repudiate them and treat the contract as having been rescinded, and maintain an action to recover back the price."

In Lawrence v. Dale, 3 Johns. Ch., 23, Chancellor Kent said that one who intends to abandon or rescind a contract for non-performance of its terms by the other, must "*act promptly and decidedly* on the *very first discovery* of the breach. *If he negotiates with the party afterwards*, and permits the work to go on, he certainly waives all right to abandon."

Beck v. Sheldon, 48 N. Y., 365, was a case where iron had been sold. The Court says on page 373:

"In executory contracts like this, if the buyer deems the article not the one contracted for he must return it to the vendor, or he must notify him of the objections and offer to return it. The right of complaint does not survive the acceptance after opportunity to ascertain the defect. The retention of the property is an admission that the contract has been performed."

The difference between rescinding the contract or accepting the goods and relying upon an action of breach of warranty is clearly set out in *Cheongwo v. Jones*, 3 Wash. C. C., 259. On page 366, Mr. Justice Washington says:

"Thus, it appears that the defendant *never thought of rescinding* the contract, nor ever charged the plaintiff with the fraud now alleged; but, on the contrary, acted throughout in a manner to affirm the contract, *and to confine his claim to compensation in damages for a breach of it. It would be too much for the Court to permit him now to change his ground.*"

In Grymes v. Sanders, 93 U. S. 55, Mr. Justice Swayne says in the opinion:

"Where a party desires to rescind upon the ground of mistake or fraud, he must upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent and continue to treat the

property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. *He is not permitted to play fast and loose.*

XIV.

The finding of facts shows that the brakes could have been changed for a comparatively small sum. (p. 35.)

While the construction of the brakes originally placed on the cars may have been such as to produce unsatisfactory results upon a line with grades as steep and curves as sharp as on defendant's 12th street line, there were brakes then in use upon other cars of like construction upon its line that only cost from $75.00 to $100.00. Presumably, these would have rendered acceptable service on plaintiff's cars, at an extreme cost, in the aggregate, of $2,500.00. After plaintiff had not succeeded in adjusting its own brakes to defendant's satisfaction, its only possible right, under its letter of April 11th, 1889, (and we deny that it had that), was to make the necessary changes and repairs itself, by applying the Laclede car brakes, if required, and charge up the cost thereof to plaintiff in diminution of the contract price. Can it be possible that for a defect that could have been remedied for $2,500, the defendant is entitled to throw back $50,000 worth of property upon plaintiff's hands hundreds of miles away from the place of delivery after inspection and acceptance?

XV.

Not only were the acts of defendant in putting the cars into operation and making changes of its own upon the brakes entirely inconsistent with its present claim of a right to rescind, *but its use of the cars for more than a month in the prosecution of its business, in the carriage of passengers for hire, and its retention of the fares collected,* **are conclusive of its election to treat the cars as its own property, and constitute an absolute bar to a rescission, even though such right may have originally survived the inspection and acceptance at the plaintiff's works.** (p. 35.)

One of the cardinal principles of the doctrine of rescission is the putting of the parties *in statu quo*. There must be no act done to

show any use of the property for purposes other than a test. Above all, the party claiming the right to rescind must not derive any benefit from such use. *A fortiori*, it must not retain any benefit which it may have received. It it does, it thereby treats the property as its own and all right to rescind is lost. The parties are not put in *statu quo*.

Defendant by making changes on the cars itself, altered the same from their original design and manufacture. They thereby became different cars.

Their use for more than a month made them second-hand cars.

The carriage of passengers for hire and the retention of their fares made the cars defendant's own property and enabled it to derive pecuniary benefit therefrom. These unequivocal acts of ownership fasten the title to the cars upon the defendant beyond all legal power of recall. If the provision in the contract for inspection and acceptance at the plaintiff's works goes for naught, because the *defect or inability* in the brakes was undiscoverable, the use of the cars as its own property, after the defect or inability was discovered, are a distinct assertion of title and ownership which defendant is estopped to deny.

The addendum to the twenty-first finding (p. 35) does not lessen the force of the fact of *use* of the cars and *benefit* derived therefrom by the defendant. It is as follows:

"On the trial defendant offered to prove that owing to the insufficiency of the brakes the cars were run at loss, and that no profit resulted from collection of fares. On plaintiff's objection this testimony was by the Court excluded."

It is to be noted that defendant saved no exception, and is not here complaining of any error below.

Such addendum not being a finding of any *fact proved* at the trial has no proper place therein and ought not to be considered by this Court. Besides, the offer was not made to the judges who tried the case below, but to a Court differently constituted upon a former trial, with whose rulings upon the evidence those judges expressly declined to have anything to do (p. 200). In addition to all this, the offer as shown by the finding was not complete. It did not show the number or amount of fares collected nor the amount of the loss or damage sustained. Besides the loss and damage claimed are not such as the Courts recognize. The answer claims $75,000 damages on this very account, no part of which was allowed by the court below, and this claim is not credited or diminished in the answer by any allowance whatever for fares collected and retained.

"Receipt will become acceptance if any act be done by the buyer which he would have no right to do were he not the owner of the goods."

Benjamin on Sales (Bennett's 6th Ed.), Sec. 703.

"In general, when a buyer asserts that the goods he purchased are not what they were warranted to be, or are so different from what he ordered, or from the seller's representation of them, or from the quality and value such articles should possess, as to give him a right to rescind and avoid the sale, he must *forthwith* return the goods if he would exercise this right. Delay in doing so, or any act equivalent to acceptance, *employment* or disposition of the goods, after he knows or should know their deficiency, if it exists, would be construed either into an admission that there was no such deficiency, or into a waiver of his right to rescind the sale because of such deficiency."

1 Parsons on Contracts (7th Ed.), 593.

"Within the doctrine of election and waiver, already explained, one cannot rescind a contract which, with knowledge that it has been broken, he has affirmed by doing anything in recognition of its continued existence."

Bishop on Contracts, Sec. 829.

In Milner v. Tucker, I. C. & P., 15, plaintiffs agreed to supply a complete chandelier *sufficient* to light the room in question properly. The chandelier proved inadequate, but the defendant kept it for some time and then returned it, seeking to rescind the contract and the court said:

"When the defendant received the chandelier and found it incomplete and inadquate to the room, he should have given the plaintiff notice *immediately*, and have returned it as soon as he could; but if a man take an article and keep it and use it as his own, though it was not according to contract, he is bound to keep it and pay for it."

Beed v. Blandford, 2 Y. & J., 278, was an action for money had and received brought by the plaintiff against defendant to recover the money paid by the former to the latter as the consideration for the purchase of the moiety of a vessel, upon the ground of the contracts having been rescinded.

Alexander, L. B. C., says in his opinion:

"In order to sustain an action in this form, it is necessary that the parties should, by the plaintiff's recovering the verdict, be placed in the same situation in which they originally were before the contract was entered into. The plaintiff has, by his intermediate occupation, derived the profits of the vessel; if he has not, he might have done so; and it is impossible to say what the defendant might have made had he, during the time, had any control over it. Under these circumstances, it cannot

be said that the situation of the parties has not been altered; and that, by the plaintiff's recovering in this action, their original position may be restored."

Vaughan, B., says in his opinion:

"The decision in Hunt v. Silk, lays down a very clear and just rule in these cases: If the circumstances be such, that, by rescinding the contract, the rights of neither party are injured, in that case, if one contracting party will not fulfil his part of the engagement, the other may rescind the contract, and maintain his action upon the faith of it."

Beaumont v. Brengeri, 5 C. B. (M. G. & S.) 301, was a case where defendant had purchased a carriage of plaintiff and requested certain changes in it.

Coltman, J., says on page 315:

"It was proved that the defendant had seen the carriage and had had alterations made in it, and had expressed his intention to use it a few times before embarking it, so that it might pass as a second-hand carriage. * * * * * * * *

Is it reasonable to suppose that the plaintiff would have allowed the carriage to be used—which would have reduced it to the condition of a second-hand article—if it had not been well understood between the parties that he had ceased to be the owner?"

Maule, J., says on page 316:

"It appears that the carriage had been completely finished before that day, to the satisfaction of the defendant; and that he had had certain alterations made in it, which was to some extent exercising the right of ownership. But when the defendant directed the plaintiff to keep the carriage for him, saying that he intended to take it out a few times, in order to make it pass as a second-hand carriage, he was clearly assuming to deal with it as his own."

Cresswell, J., says on pages 316 and 317:

"The defendant assumed to be the owner by ordering the carriage out for a drive. * * * * * * *

Using it even for a short time, would, of course materially depreciate it."

In Street v. Blay, 2 B. & Ad., 456, Lord Tenderden says:

"But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial; where he has exercised the dominion of an owner over it, by selling and parting with the property to another, *and where he has derived a pecuniary benefit from it.* * * *

"These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant that the

particular chattel was his own; and it may be added, that the parties cannot be placed in the same situation by the return of it, as if the contract had not been made, *for the defendant has derived an intermediate benefit, in consequence of the bargain, which he would still retain.*"

In Clark v. Dickson, 96 E. C. L., 148, Crompton, J., says:

"The true doctrine is, that a party can never repudiate a contract after, by his own act, it has become out of his power to restore the parties to their original condition."

Lyon v. Bertram, 20 How., 149, was an action for the purchase price of certain flour, part of which defendant had used. He was held not entitled to repudiate the contract on the ground that the brand upon the flour was not that for which he contracted. The Court says in the opinion:

"But while the first proposition of the note in the leading cases is a matter of dispute, there is none in respect to the conclusion that the purchaser who has received and used the article, and derived a benefit from it, cannot then rescind the contract."

This principle is stated in Hunt v. Silk, 5 East., 449, in which Lord Ellenborough says:

"Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put in *statu quo*. And if the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelve-month on the same account? This objection cannot be gotten rid of. The parties cannot be put in *statu quo*."

In Perley v. Balch, 23 Pick., 283, the same principle is applied to contracts of sales of chattels. The Court says:

"The purchaser cannot rescind the contract and yet retain any portion of the consideration. * * * * *

The purchaser cannot derive any benefit from the purchase and yet rescind the contract. It must be nullified *in toto* or not at all."

In Burnett v. Stanton, 2 Ala. R. 183, the Court says:

"A contract cannot be rescinded without mutual consent where circumstances have been so altered by a part execution, that the parties cannot be put in *statu quo*, for if it be rescinded at all it must be rescinded *in toto*."

Magee v. Billingsley, 3 Ala. 679, was an action for the purchase price of certain cotton sold by sample where the defendant claimed a rescission of the contract. The Court says in his opinion on page 695:

"But if the vendee, after time for inspection, treat the goods as his own, by exercising an act of ownership over them, he will be considered to have accepted them, and cannot afterwards repudiate the contract, so as to resist an action for the price."

Boothby v. Scales, 27 Wis. 626, was an action upon a promissory note given for the purchase price of a fanning mill and in which the defense was a breach of warranty of quality. The defendant in that case did not offer to return the fanning mill until six months after its delivery to him, nor until after the note in suit became due. In the meantime he had loaned it to a neighbor who had used it for more than a month. After its return the defendant ran 100 bushels of wheat through it and found that it did not do good work. He retained it, however, until the following season when he tried it for seed wheat and found that it would not do for that. He then offered to return it. It was held that *as a matter of law* the offer was too late. The Court says in the opinion on pages 638, 9 and 40:

"No jury has the power arbitrarily to say that six months or six years is a reasonable time in which to test a fanning mill, when everybody knows that a single day, or at most two or three days, with all the conveniences at hand, is amply sufficient for that purpose. The very meaning of the rule is, that the purchaser shall have fair and sufficient time and opportunity, all the circumstances considered, including his own, to test and examine the property and ascertain whether it corresponds with the warranty or not, and if not, immediately to return or offer to return it to the seller, and claim a rescission of the contract. It is inconsistent with the nature of the right or privilege thus given the purchaser, that there should be any unnecessary delay in the exercise of it. The seller in the meantime is deprived of the use of his property, and perhaps of the opportunity for re-sale. He is liable to refund the purchase money with interest from the time of sale; or, if it has not been paid, he loses the interest on it. These considerations are sufficient to require promptness and forbid needless delay on the part of the purchaser. If it appears that he had ample time and opportunity to test and examine the article, and ascertain its quality or capacity with reference to the warranty, and might have conveniently done so, but neglected to do it, such neglect should be regarded as a waiver of the right to rescind, and as an election on his part to retain the property, subject to such claim for damages as he might subsequently establish. * * * * * * * * *

I think that by retaining the mill after the first trial, and not then immediately offering to return it to the plaintiffs, the defendant made it his own, without privilege of return, even supposing his loan of it to Walton for upwards of a month was not an absolute waiver of such privilege, which I am also strongly inclined to think. Such lending seems to me to have been the exercise of an act of ownership inconsistent with the mere right of trial or examination, which the purchaser under such circumstances has, where he intends to return the property on account of a breach of warranty or of any of the conditions of the purchase."

Cream City Glass Co. v. Friedlander, 84 Wis. 53, was an action to recover half the purchase price, freight and duty, on a shipment of soda ash. The said ash was manufactured at Liverpool, Eng., and shipped from there to the plaintiff's factory in Milwaukee. Upon receipt the plaintiff opened and inspected the ash and rejected it as absolutely unfit for use and gave the defendant notice thereof. The defendant declined to receive the property back, and thereafter the plaintiff made a practical test of the material by using about six tierces thereof, from which it was claimed to have been shown that glass could not be made from the ash. The Court, in reversing a judgment in favor of the plaintiff below, says:

"It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. * * *

If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. * *

But this test is plainly for the purpose only of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property, in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. * * *

They must do no act which they would have no right to do unless they were owners of the goods. Benj. Sales (6 Ed.), Sec. 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. It was claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent's property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected and was owned by defendant."

Hoadley v. House, 32 Vermont, 179, was a suit to recover the purchase price of certain pork which had been sold and delivered to the defendant, after the defendant had received a portion of the goods and disposed of them. He discovered that they were different in kind from those contracted for, and immediately notified the plaintiff to take the remaining goods back for that reason, and said he would pay him for the portion he had sold. It was held that the rescission of the contract

was not complete because the vendee did not tender the vendor the value in money of the goods which he had sold.

In Shaeffer v. Sleade, 7 Blackf. (Ind.), 178, Sleade sought to rescind for false representations as to title and quality a contract made for the purchase of a certain barge "containing a portrait of General Washington and 56 figures representing the signers of the Declaration of Independence," which at the time of the purchase were being exhibited under the title of "The Grand National Exhibition of the Signers of the Declaration of Independence of the United States." The figures were represented to Sleade to be made of a superior composition, having no wax in them, and not to be affected by heat or cold. This he found out to be false. After experimenting with some of the figures, which resulted in their mutilation, Sleade continued the exhibition while the property was in his possession. He made no return of the receipts when he attempted to rescind. The Court says in the opinion on page 185:

"It furthermore appears that the property cannot be restored in the same condition in which it was at the time of the contract, on account of some part of it being mutilated and disfigured by experiments made to ascertain the ingredients of which it was composed. Another reason why the contract should not be rescinded on the application of Sleade is, that he has rendered no account of the receipts during the time the figures were in his possession, nor are there any means of ascertaining satisfactorily what they amounted to. For these reasons a recission of the contract cannot be decreed."

Brown v. Foster, 108 N. Y., 387, was a case where the defendants contracted to manufacture certain machinery for a steam saw mill, and put the same up in running order at a place specified. The referee found that the machinery supplied did not meet the requirements of the contract. Plaintiff used it in his business, however, after the discovery of the defects therein. It was held that he was bound for the contract price, and was not entitled to damages for breach of contract.

The Court says on pages 390, 391:

"The plaintiff then became subject to the general rule that one who seeks to reject an article as not in accordance with the contract, must do nothing after he discovers its true condition inconsistent with the vendor's ownership of the property. He would, in such a case as the present, be entitled to a reasonable time for examination; long enough to put the machinery in motion and see it operate, and he might *for that purpose* do with it whatever was necessary, and if, after such examination, *without dealing with it in any other way or for any other purpose*, he rejected it, acceptance could not be implied. The evidence in this case, however, permits an inference that the plaintiff exercised a dominion over the machinery inconsistent with ownership in the defend-

ants, and consistent only with title as well as possession in himself. *He used the machinery in the prosecution of his business, and, although complaining, did not intermit its use.*

Knowing its defects he continued to run it. His interest in so doing may be gathered from his acts as well as from his words, and it cannot be said as matter of law those acts do not afford substantial proof of an acceptance, *not for the purpose of examination, but for use.*

The complaints continued to October tenth, but so did his use of the machine, and later until November twenty-sixth when the work on hand having been completed, and the season over, the machinery was uprooted and stored, with notice to the defendants. If these things had been done at the moment of discovery that the machinery was not in compliance with the contract, the obligation of the plaintiff would have been discharged.

At the time when they were done, the right of rescission had been lost. *The continued use of the machinery in the promotion of his own business interests, with knowledge of its imperfections, was an unequivocal act of acceptance, which no words of his own could qualify.*"

Again on page 392, the Court says:

"It is true the vendee said 'I will not accept,' but this was of no consequence, when, after an opportunity to inspect and with full knowledge of its quality, he still not only retained the machinery, *but enjoyed the benefit of its use.* That act was one *of ownership and completed the transaction;* and the transmutation of property from the vendor to the vendee was final. The contract then became the only measure of the defendant's right or the plaintiff's liability."

Again on page 393, the Court says:

"*An application after trial of the machinery to the use of the vendee in the regular conduct of his business,* is as significant as a sale to others and such an act is as unequivocal. Whether profit is sought by that use or by a sale can make no difference.

"The effect of the sale would not depend upon the price obtained, nor the effect of the 'use' upon the efficiency of the machinery.

"In either, the object is the same, the advantage of the vendee through instruments obtained by contract from the vendor, and such act expresses an unmistakable assent that the machinery is in a deliverable state, and that it does conform to the contract. It is an election to take the benefit of the contract, although its execution by the vendor was different or inferior to that expected."

XVI.

If to justify a rescission, the parties must be put in *statu quo* as far as possible, is it not necessary to return or offer to return the cars to Pullman Junction or Kensington, where the contract provided for their delivery after inspection and acceptance, and where they were in fact delivered?

Even if defendant is held to have the right to turn the cars into second-hand cars, with the consequent immense deterioration in value, and even if it is permitted to retain the fruits derived from the use of plaintiff's property, can it be successfully contended that it has the right to throw the cars upon the plaintiff's hands more than five hundred miles away from the place of delivery and require it to pay the freight thereon back to its own works?

Young v. Arntze, 86 Ala., 116, was an action for breach of special contract growing out of the sale of certain machinery where the defendants sought to rescind. "The proof showed that Flint Bridge, near which defendants set up their machinery, was five or six miles south of Decatur where plaintiffs lived and from which place the machinery was shipped to the defendants. The defendants did not return or offer to return the property to Decatur." The Court says in the opinion:

"If the right of rescission was exercised, the defendants were required to place the plaintiffs in *statu quo* by returning the goods to them at the place where the trade was consummated by delivery."

XVII.

Upon what principle, too, can the action of the Court below be sustained, in requiring plaintiff to re-pay the freight which, under the contract between the parties, defendant expressly agreed to pay?

Even upon the assumption that the inspection at the plaintiff's works was an idle ceremony and that the final test of the cars was to be made on defendant's line, it agreed specifically to pay the freight and no provision was made in the contract for its return in case the cars proved unsatisfactory. Upon defendant's own theory, the contract clearly

means that while plaintiff may be willing to run the risk of a trial of the cars upon defendant's line, it is not willing to pay for carrying the cars to their destination, and this sum defendant agreed to pay and assumed the risk of its loss. If the plaintiff had been directly or remotely liable for its return, presumably the contract price would have been that much greater.

XVIII.

No disposition is made in the finding of facts of the claim for extra items made by the plaintiff in the petition.

Either no evidence was offered in support of them, which fact the Court should have found, or they were supported by evidence and an allowance should have been made therefor as they were not covered by the original contract and no complaint is made of their insufficiency. This Court ought to reverse the judgment of the Court below on the ground that the finding of facts in this regard is incomplete and did not cover the whole case. The very ordering of these extras shows that defendant considered the cars to be its own property after inspection and acceptance at the plaintiff's works.

XIX.

Upon the whole case, we respectfully submit that the judgment of the Court below should be reversed.

First. Because under the contract, the parties expressly agreed that the quality and fitness of the cars should be finally determined by defendant after they were complete, upon an inspection at plaintiff's works, which inspection was actually made and the cars accepted.

Second. Because there was no express warranty of fitness, and the contract distinctly negatived any implied warranty thereof which survived the examination by defendant's inspector at plaintiff's works.

Third. Because the original contract between the parties remained unchanged and unmodified by any subsequent agreement between the parties, and the same was not subject to addition or alteration by parol and could only be changed by a new contract based upon a valuable consideration.

Fourth. Because the defect in the brakes could have been discovered upon more careful inspection or if proper facilities had been provided by defendant or demanded of the plaintiff.

Fifth. Because after the cars had been inspected and accepted and delivered free on board, the title thereto had passed, and if defendant had any right (which we deny), it was to recoup its damages in this suit, which right its counsel expressly disclaimed.

Sixth. Because the conduct and correspondence of the parties prior to May 12th, 1888, interpreted the contract according to its legal effect and showed that they both regarded that the title to the cars had passed and that no right of rescission remained.

Seventh. Because the defendant, by making changes and repairs in the brakes and especially by putting the cars into service and carrying passengers for hire and retaining the fares, unequivocally appropriated the cars to its own use and elected to retain the same, even though it had a right to rescind, in the first instance, after a *test* upon its line, which plaintiff denies.

Eighth. Because under the offer to rescind, the parties were not and could not be put in *statu quo* by a return of the cars in as good condition as they were received, to the place where they were delivered after inspection and acceptance, with a re-payment of all benefits derived from their use.

Ninth. Because the Court erred in ordering plaintiff to re-pay the freight which defendant had contracted to pay without any reserved right to a return thereof.

Tenth. Because the finding of facts was incomplete as to the extra items claimed in the petition.

Eleventh. Because upon the finding of facts as made, the Court below should have rendered judgment for the plaintiff and against the defendant, for the contract price of the cars with interest.

ARGUMENT.

The contract between the parties provided for inspection and acceptance of the cars at the plaintiff's works.

The ordinary manufacturer's warranty of fitness after actual trial on the defendant's track was thereby expressly excluded.

The provision for inspection extended to the *cars* in their entirety, the *brakes* as well as every other portion of the cars.

Without brakes the cars would not be complete; they were integral parts of the cars, and the inspection was to cover them just as much as the wheels, windows, doors and seats.

The provision for inspection was in general terms; it was clear and unequivocal; no exception therein was made as to the brakes; and the Court cannot interpolate an exception in order to aid the defendant to escape from its contract, voluntarily entered into and untainted by fraud. The Court is not constituted for the purpose of making dispensations in favor of parties competent to contract, who seek to avoid liability under a perfectly valid agreement, in which they have provided for no such dispensation. The Court below found that the difficulty about the brakes was this:

"When the brakes were so adjusted that they could be used to stop the car on a straight level track, in passing around a curve or up a grade they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars." (p. 31.)

If it be true, as also found by the Court below, that such a defect or inability in the brake as this "could not be discovered without a practical test on defendant's railroad track or over like track" (p. 35), defendant, having in its employ engineers of skill and experience in the construction and practical operation of cable cars, with full knowledge of the steep grades and sharp curves on its Twelfth street line, and of the heavy, combination cars which it was ordering, ought to have provided in the contract that its inspection at the plaintiff's works was not to include the brakes, but that, as to their want of fitness, "which could not develop to the observation on inspection, and was only discoverable when put into use on the defendant's track or similar track" (p. 35), a test on its line was indispensable, and therefore that final acceptance of the cars would not take place or be complete until that test was made.

With such provision in the contract, defendant, under the finding of facts, might possibly have some legal ground to stand on if it were not for the fact of its having used the cars as its own and not simply for the purposes of a test. As the contract reads, however, its rejection of the cars after actual inspection and acceptance and delivery, is utterly indefensible.

If such provision had been proposed by defendant, it is not unreasonable to assume that the contract would never have been made. In view of what the plaintiff required as to inspection and acceptance at its works after the cars had been built, it is hardly to be supposed that it would have been willing to risk an investment of fifty thousand dollars upon a test to be made by the other party more than five hundred miles away from its works, upon a line whose grades were heavy and whose curves were severe.

The stipulation which plaintiff did exact as to inspection and acceptance of the cars at its works when built was a most reasonable one. Car building requires special machinery and skilled workmen. If defendant's inspector was to pass upon the cars, point out the defects therein and objections thereto after they were built, the proper place for that to be done was at plaintiff's works where it had the facilities to remedy them.

If the trouble with the brakes was that "there being so many connections and consequently so much lost motion, that before the shoes hug the wheels the brake lever comes to the limit of the quadrant," as Mr. Lawless, defendant's inspector and superintendent, pointed out in his letter of March 23d, 1888, to plaintiff's general manager (p. 31), on the first trial of the cars over the line, it would seem, in the first place, that that defect ought to have been discovered at the place of manufacture without difficulty, and, in the second place, that that sort of defect was peculiarly one to be remedied at the plaintiff's works, where its own men and machinery were at command, either by readjusting or eliminating some of the connections, or by substituting a different kind of brake, which Mr. Lawless, with his skill and experience in "the practical operation of cable cars" (pp. 35-6), might have been able to design or suggest. For it appears, inferentially, at least, in the finding of facts, that the plans and specifications for the cars were under the control of defendant, because on July 16th, 1887, its engineer submitted specifications increasing the length of the cars from 34 feet 9 inches, as originally specified by plaintiff, to 38 feet over all, and their width from 6 feet 6 inches to 8 feet 3 inches over all, and fixing the length, height, width and size of different parts of the car as it saw fit (pp. 29-30).

The answer, too, specifically alleges that in executing the contract submitted by plaintiff, defendant reserved control over the details of the cars by providing that the plans thereof were to be sent for approval to its

engineers (p. 19), and "that the plans aforesaid were furnished" (p. 20). It is true that the Court below found that no plans or specifications of the brakes were furnished to the defendant during their construction. But if it had the right to call therefor and failed to exercise it, is the plaintiff to suffer on account thereof?

It was practically conceded below that if the plan of the brakes had been sent out and approved by the defendant's engineers, before they were made and attached to the car, such approval would have bound the defendant to their acceptance. But is not an actual inspection and acceptance of the brakes themselves by the defendant's superintendent and engineer to be held equally as efficacious as an approval of the plan would have been?

Whatever the defect in the brakes may have been, however, and whatever the control of the defendant over the plans, plaintiff required that the cars, both as to plan and construction, as to defects or insufficiencies of all kinds, whether in the brakes or in the wheels or windows or seats or doors, or any other part of the cars, should be passed upon and pointed out when the cars were built and while they were still at its works. Defendant agreed to this requirement, without any reservation and without excluding any part of the cars from the force and effect thereof. It thereby undertook to discover all defects, and expressly assumed the risk of there being any defects which could not be discovered except by an actual test upon its line. Its agreement extended not only to inspection, but acceptance at the plaintiff's works was required as well. As this Court said in the Pope v. Allis case, *supra*, acceptance implied the right to reject. Hence, after inspection, if any defects had been pointed out which could not be remedied, or which plaintiff had failed to correct, defendant would have had the right to reject the cars, and plaintiff could not have compelled their acceptance. But the defendant, by its duly authorized representative, with all the powers in that regard of its Board of Directors, himself a man of skill and experience in the construction and practical operation of cable cars" (pp. 35-6), did inspect and did accept the cars which plaintiff had built, and his action was final and irrevocable. And his inspection extended with particular care to the very matter in dispute in this case, to-wit, *the brakes*. The Court below found that he "made a thorough examination of said cars, inside and out, *and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith.*" (p. 30.)

Was this inspection of the brakes an idle ceremony? Why examine them at all if it amounted to nothing? Why observe their operation and application, by having them worked

from within while he was "under and at the side of the car," if nothing was to be determined as to whether they would operate on defendant's line, in the inspector's judgment, or whether the brake power was applied properly and with sufficient force? Did his inspection extend to an approval of the brakes while the cars were on straight track and on level ground, and not to their operation while the cars were going up grades or around curves? If so, he made no such statement or reservation at the time, and the contract provided for nothing of the kind.

The inspector knew defendant's Twelfth street line much better than the plaintiff did and was more familiar with its grades and curves; he had had experience in the construction and practical operation of cable cars in San Francisco; he was an expert in such matters.

He came to Chicago by defendant's direction, to ascertain whether the cars plaintiff had built were reasonably fit for use on defendant's Twelfth street line. His object could not have been anything else. That was the sole purpose of his visit (p. 30). When he "examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car," he did it for the purpose of deciding whether the brakes were sufficiently powerful and properly adjusted to hold the cars at any point on defendant's Twelfth street line, whether on the level or on the grade, and whether, when not applied, they were so far from the wheels as not to bind in rounding the curves. He decided that they were fit for the use for which they had been made, and his decision was final. He announced himself as satisfied therewith, and thereby estopped defendant from ever asserting its dissatisfaction as a defense to a suit for the purchase price of the cars. He was the chosen arbiter of defendant to pass upon the question of the fitness of the cars, appointed under an express provision of the contract, and by his determination defendant is bound beyond the power of recall.

If the inspection by defendant's superintendent was incomplete and inadequate, that was not plaintiff's fault. Ample opportunity was afforded for any and all tests he deemed it necessary to make; if, perchance, he omitted any, no matter whether they were vital or not, such omission will not impair plaintiff's claim or diminish defendant's liability. The defense in this case necessarily rests upon the ground—not that no inspection was made—but that the inspection which was made was partial and insufficient. But how can this serve defendant? It clothed its superintendent, who was sent to make the inspection, with ample power to act for it. His act was defendant's act. If he failed to make all the tests that he should have made, and, by reason of such failure, did not discover that the brakes were unsuitable for the require-

ments of the grades and peculiar conditions of defendant's railway, how can defendant be benefited thereby?

To escape liability, defendant's contention is that the manufacturer's implied warranty of fitness existed, notwithstanding the express terms of the written contract between the parties, and survived the inspection and acceptance made by its chosen representative at plaintiff's works. But what language could have been used by the parties in the contract to more clearly exclude such warranty? It breathes the spirit of "*caveat emptor*" in the fullness of that doctrine, although the English language is used instead of the Latin. Both are presumed to know the law which requires a manufacturer, when an order is given to him by one who trusts to his judgment, to make the article in such a way as to be reasonably fit for the purposes for which it is ordered. This responsibility plaintiff was unwilling to assume, unless the question of fitness was determined at its own works after the article was made. It, accordingly, said to defendant:

"I will take your order; I will make your cars according to plans and specifications; but you have a line with severe grades and acute curves, of which I only have a general knowledge (p. 27), while having selected the route, you are thoroughly familiar with them; you are ordering a combination car, which from its style and the dimensions you require, must necessarily be heavy; and when I have the cars built, complete and ready for delivery, you must come to my works and inspect them, and exercise your own judgment in determining whether they are fit for your purpose."

Defendant answered and said:

"That is a perfectly proper provision of your contract and your reasons for requiring it are good. I will assent to it, not only because you insist upon it as a condition of taking my order, but, also, because, having an engineer in my employ as superintendent, who not only knows the grades and curves of my Twelfth street line but has had experience in the construction and practical operation of cable cars elsewhere, I would much rather trust his judgment than yours as to whether the cars which you propose to build are the kind I want, and whether they are suitable for my Twelfth street line."

The contract was executed upon this understanding and the parties have acted under it. Unless this Court is prepared to strike down that provision which requires inspection and acceptance at plaintiff's works as void, which even defendant does not claim, it must be held that the continuance of the implied warranty of fitness on the part of the plaintiff as the manufacturer of the cars, after such inspection and acceptance, was thereby clearly and unequivocally excluded—excluded just as effectually as though the contract had read:

"Cars to be inspected and accepted at our works, and the warranty

of fitness that, in the absence of this provision, would extend to the receipt of the cars at Kansas City and a test on your line, is not to be implied."

The other provisions of the contract are in harmony with the one which requires inspection and acceptance of the cars by defendant at plaintiff's works.

It stipulates for delivery to the defendant, the final act in transferring title and possession after goods have been examined and appropriated, free on board the cars at Pullman Junction or Kensington. From there, defendant is to pay the freight, because the cars are its property. After being loaded, the risk of loss is upon the defendant, because the title to the cars has passed.

The contract also provides that the terms of the sale are cash on delivery. After the cars have been inspected and accepted at plaintiff's works; after it has delivered the same free on board the cars, its right to the contract price is complete. To a subsequent demand therefor, defendant has no legal defense.

If it had been sued by the plaintiff for its purchase money as soon as the cars had been examined, approved and shipped, what answer could the defendant have made which would have been a bar to recovery? None whatever. And if plaintiff did not insist on immediate payment, how can the mere lapse of time, without any new contract between the parties, destroy or diminish plaintiff's legal right to the price of its cars?

Suppose defendant had paid the purchase price to the plaintiff, after inspection, acceptance and delivery, and before the cars were tried on the line in Kansas City. Defendant's counsel would hardly have the hardihood to say that, under the contract or otherwise, they would have any right to recover it back. But if the defendant could not have rescinded the contract after payment, it cannot defeat an action for the contract price by an attempt to rescind.

The parties themselves, by their conduct, construed the contract to mean exactly what we claim it means. When the first instalment of cars was built and ready for shipment, plaintiff called upon defendant to send its inspector to examine them. Defendant promptly instructed its superintendent, Lawless, to go and inspect the cars. He did so; and after a critical examination, accepted them and ordered their shipment, and directed that the remainder be built in the same way and shipped, without further inspection, which was done. Defendant paid the freight on the cars as its own property. When they arrived, they were stored in its own power-house. When a part of its line was in condition, a car was run over it, and trouble with the brakes having developed, defendant called upon plaintiff to come to its aid by proposing a remedy. When its whole line was completed and ready for operation, the cars

were put into service. When the difficulty again appeared, defendant itself made "constant repairs and *changes* to the car brakes," (p. 32), and, in calling for plaintiff's assistance in this regard, it proposed this alternative:

"If you will send a practical man here to take charge of these necessary changes, it will be the best plan, otherwise we shall be obliged to make them and charge you with the expense." (p. 32).

For more than a whole month, defendant used the cars in its business, receiving passengers thereon and collecting fares from them. These fares it has never returned.

From the time the cars were inspected and accepted by Mr. Lawless, defendant's superintendent and inspector, in December, 1887, down to the expiration of the month and over in which it carried passengers for hire thereon, in May, 1888, there was no claim or suggestion made to the plaintiff by the defendant that the cars were not its property and that its inspection at the plaintiff's works was not final.

The acts of defendant and its correspondence with the plaintiff are wholly inconsistent with the continuing existence of a right of rescission.

And what the plaintiff did to assist the defendant in resolving the difficulties it had encountered in the operation of the cars, cannot be tortured into a recognition of its right to rescind. What it did was done of its own free will, in a spirit of business prestige, with a due regard for its reputation as a builder of cars, and for the purpose of keeping defendant as one of its customers.

The original contract was not only not changed or modified, but no consideration whatever is shown for any supposed modification.

That plaintiff did not consider it had frittered away any of its contract rights by the voluntary aid which it had rendered the defendant, or that the defendant retained a right to rescind after inspection and acceptance at plaintiff's works, appears beyond a peradventure from the letter of its general manager of May 17th, 1888, in reply to the letter of defendant's president of May 12th, 1888—a date subsequent to all of the events above detailed in reference to the changes and repairs to the brakes and the use of the cars for the carriage of passengers and the collection and retention of fares from them—announcing a resolution of its board of directors "rejecting the 25 cars furnished by your company for 12th street on account of the imperfect brakes and other seriously objectionable features" (p. 34.) The reply of the general manager, after acknowledging receipt of the president's letter, is as follows:

"*You are cognizant of the fact that the cars were built according to plans approved by your chief engineer, the material used, as well as the workmanship, being first-class in all respects.*

The cars before shipment were inspected and accepted by your Gen'l Superintendent. The cars were then shipped to, received and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car, your officers pronounced them satisfactory; thereupon, the brakes were in like manner examined and adjusted on the remaining cars, all the cars then being in use by your company.

In view of the facts, your present statement to the effect that you reject the cars on account of imperfect brakes and other seriously objectionable features is quite astonishing, and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim.

I have to request, therefore, that you will, without further delay, remit the amount due this Company for said cars, as per bills heretofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us." (pp. 34–5.)

This letter, we respectfully submit, although written by a layman, is an unanswerable statement of the reasons why defendant should be held liable to pay the contract price of the cars without deduction.

It is to be remarked that the defendant's board of directors resolved to reject the cars not only on account of the imperfect brakes, but for "other seriously objectionable features." What those features were the directors did not disclose, unless, possibly, to their counsel, for we find in the answer a complaint that "the cars were of too great weight to be operated over the curves and grades upon said line" (p. 21). This charge we confess; but inasmuch as the defendant, by the contract, required the plaintiff to build combination cars, instead of the lighter equipment of grip car and coach, separate, and inasmuch as the weight of the car was necessarily determined by the dimensions prescribed by the defendant, are we wrong in asserting that this is an objectionable feature for which plaintiff is not to blame and the existence of which would hardly justify the rejection of the cars by defendant after more than a month's use in the prosecution of its business?

With the fact asserted in the President's letter that there were other reasons for rejecting the cars besides the imperfect brakes, is it unreasonable to infer, in view of the allegation of the answer, that the "objectionable feature" which inspired and controlled the action of the board of directors, in attempting to reject the cars, was not so much the imperfect brakes as the discovery, after more than a month's experience, that the combination cars which it had insisted upon having built "were of too great weight to be operated over the curves and grades upon said line"?

When this suit was brought, defendant's counsel, who are learned

in the law, as, presumably, its directors were not, recognized that under the written contract between the parties, there was no escape from a judgment in favor of the plaintiff for the purchase price of the cars, and so they attempted to plead away from the contract by alleging in the answer the following change and modification thereof, as made by mutual consent and for a consideration :

"Said cars were to be delivered at Kansas City, Missouri, and tested by defendant before acceptance. The provisions as to acceptance and inspection at the works of plaintiff were abandoned and set aside." (pp. 21-2).

If the proof was at hand when this allegation was inserted in the answer, it was not produced at the trial. The finding of facts by the Court below is silent as to the making of any such change or modification; and that plaintiff ever assented thereto or received any consideration therefor "cannot be discovered by any reasonable inspection" of the record.

A conclusive answer to the claim of the defendant that it had the right to test the cars upon its Twelfth street line in Kansas City before acceptance, may be found in the consideration that if such request had been made, prior to the shipment of the cars, plaintiff would have had the right, under the written contract, to decline such request, and defendant would have had no right thereunder to insist upon compliance. It had agreed to determine by inspection at the plaintiff's works, whether the cars were fit for the purpose for which they had been ordered, and no test upon the Twelfth street line before acceptance could have been demanded, because the contract did not provide therefor.

In the ordinary case of ordering goods to be made by a manufacturer for a particular purpose, the purchaser trusts to the superior knowledge and judgment of the manufacturer and awaits the arrival of the goods at their destination before examining them. In such case, it is eminently fair and right that the manufacturer should be held to impliedly warrant the goods to be fit for the purpose for which they were ordered and made; and if, upon examination, they prove unfit, that the buyer should be entitled to reject them. This general doctrine of the law is conceded. But in the case at bar, there was a special, written contract, whereby it was expressly agreed that the buyer should not trust to the knowledge and judgment of the manufacturer, but should rely upon its own, which under the finding of facts was superior, and that an examination of the goods to determine their fitness should be made—not at the place of ultimate destination—but at the manufacturer's works. The moment, then, that plaintiff, as manufacturer, had built the cars and offered them to defendant as in compliance with the contract, and invited defendant to come and inspect them and determine their fitness and efficiency, that moment the contract said, "*caveat*

emptor;" and, there being no express warranty and no pretence of fraud, defendant's inspection covered all defects, both latent and patent, and its acceptance made the cars its property and cut off all right of rejection by resolution of its board of directors, no matter how solemnly passed.

There is no dissenting voice in the authorities from the proposition that goods made to order by a manufacturer under a contract and tendered for inspection and acceptance after they are made, stand upon exactly the same ground, so far as the doctrine of *caveat emptor* is concerned, as though they had been in existence and ascertained at the time the buyer came to the manufacturer's to make a contract for the purchase of the same, after examination. In both cases, the purchaser must "beware," for he, alone, takes the risk.

In the case at bar, how unjust it would be to hold the plaintiff liable for difficulties in the operation of the cars, which resulted, not from their manufacture, but from the peculiar physical conditions of the defendant's road. Those conditions were of defendant's own making. The heavy grades and sharp curves, they decided upon. These were made necessary by the state of the streets upon which defendant determined to run its road. With all these matters plaintiff had no concern. Possibly, the *general knowledge* of those grades and curves which the Court found plaintiff's contracting agent had, without actually going over the line (p. 27), was the very reason why the plaintiff insisted that the fitness of the cars when made must be finally determined at its works by the defendant and before shipment.

The implied warranty of fitness on the part of the manufacturer is founded upon the assumption that he has superior skill and knowledge in regard to the goods which he makes; that by the exercise of proper care, he can guard against and avoid all defects of manufacture; and that in reliance thereon, the purchaser gives him an order. In the case at bar will the Court, to render the plaintiff liable as a manufacturer, imply a warranty against a defect in the brakes, which defendant's inspector, after a careful examination, not only failed to find, but which the Court below held could not be discovered at the place of manufacture at all, but "was only discoverable when put into use on the defendant's track or similar track?" (p. 35.)

If it be true that the defect or inability in the brakes was undiscoverable at plaintiff's works, then plaintiff could not have ascertained it in the process of manufacture, no matter how much care it exercised, and the implied warranty of fitness does not apply. If the efficiency of a brake can only be determined by a practical test on a cable line, defendant knew that fact when it made the contract, for its superintendant had had prior experience in the construction and practical operation of cable cars; and not having provided for that contingency by

a saving clause in the contract, the Court will certainly not interpose in its favor, by interpolating such saving clause, to the detriment and disadvantage of the plaintiff.

Under the contract between the parties, the title to the cars passed from the plaintiff to the defendant the moment they were delivered to the carrier, the defendant's agent in that behalf, free on board, pursuant to the order of its superintendent after he had inspected the cars and "announced himself as satisfied therewith." (p. 30). His expression of satisfaction and order for shipment constituted an acceptance, and the delivery to the carrier completed the transfer of title. The right of rescission was then at an end.

If in the face of the express contract, a warranty of fitness, surviving inspection, is to be implied against plaintiff, a breach of that warranty, under the law, as laid down by this Court, did not authorize defendant to reject the cars, the title to which had already passed, but only to recoup its damages in this suit. Counsel for defendant distinctly asserted below that no damages by way of recoupment were claimed. (pp. 105–6.)

The Court below found that "the defect in the brake was a latent one which did not and could not develop to the observation on inspection, and was only discoverable when put into use on the defendant's track or similar track" (p. 35).

The nature of the defect was found by the Court to be this:

"When the brakes were so adjusted that they could be used to stop the car on a straight, level track, in passing around a curve or up a grade, they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars." (p. 31.)

Defendant's superintendent and inspector gave the following reasons why the brakes would not work satisfactorily:

"There being so many connections, and consequently so much lost motion, that before the shoes hug the wheels, the brake lever comes to the limit of the quadrant." (p. 31).

Now, where the facts constituting the defect are specifically found, and, hence, not subject to dispute, is it not a question for this Court to decide whether or not the defect is a latent one which could not be discovered on inspection, just as in cases of negligence, for example, where the facts are uncontroverted, it is a question of law whether they constitute negligence or not?

If the question is open for consideration, it would seem as though this defect, or *inability*, in the brake, as the Court below puts it (p. 35), ought to have been discovered by the expert, with skill and experience in the construction and practical operation of cable

cars, whom defendant sent to plaintiff's works to make an inspection. When the brakes were so adjusted that if applied they would stop the cars when the wheels were in a straight line, ought not such inspector, by placing the wheels at an angle equal to the sharpest curve on defendant's line, to have been able to determine whether such adjustment of the brakes, when the power was released, would bind the wheels when going around the curves? Ought he not to have had the ability to decide whether the adjustment of the brakes, which, when applied, would hold the cars on a straight track, was such that it would interfere with the wheels when going up a grade? Ought he not to have found out that, owing to the number of connections and the consequent loss of motion, the brake lever reached the limit of its power before the shoes hugged the wheels? He, certainly, could have done all this just as well as the manufacturer could; and if the manufacturer could find out these things in the making, the inspector certainly could discover them upon examination after the cars were built.

Defendant's inspector must have been satisfied with his ability to find all the defects that existed in the brakes, because he made no further request for testing them (p. 30), but if he was, in fact, unable to discover the defect or inability which afterwards developed on the line, while the cars were on the floor in plaintiff's shops, that defect or inability would certainly have been disclosed by the building of a small piece of temporary track, having the steepest grade and sharpest curve of defendant's line? And defendant having expressly agreed to inspect and accept the cars at plaintiff's works, it was the duty of its inspector either to provide or call for all the facilities he needed or desired to make a thorough inspection and discover all defects. He did neither; and if by such omission he failed to make discovery of the defects which would otherwise have been disclosed, the fault must be with the defendant and not with the plaintiff, and defendant must suffer the consequences.

Under such an agreement as was made, the difficulty or inconvenience or expense of inspection will not excuse its lack of thoroughness. If, with any facilities which might have been provided, the defects now complained of might have been discovered, defendant is in default if its inspector failed to provide such facilities or to call upon plaintiff to provide them. The very statement of the character of the defect or inability which developed upon defendant's line shows that it might have been discovered, either with proper tests made with the cars standing as they did on the floor of plaintiff's shops, or, certainly, with the facilities for inspection which defendant might have provided or called for.

But, whether this be true or not, we still contend that, under the contract, defendant took the risk of discovering all defects upon its inspection, whether latent or patent, the provision for inspection and ac-

ceptance at the plaintiff's works meaning "*caveat emptor*," in the broadest sense of the term.

If, however, the provision in the contract for inspection and acceptance at the plaintiff's works should be held not to exclude the continuance thereafter of the implied warranty of fitness, the defendant must, nevertheless, be held to have accepted the cars and bound itself to pay the contract price. When its line was completed and ready for operation, if its right to test the cars to determine their fitness and efficiency still remained, they could be used for the purpose of a test and for that alone. But defendant put them into service, not solely for testing them, but for the carriage of passengers for hire as well. It thereby appropriated the cars to its own use, and they became its property, with the accompanying liability to pay the plaintiff therefor. It received a pecuniary benefit from the use of the cars which it has never paid over or tendered to the plaintiff. Such use, however slight, such benefit, however small, constitute unequivocal acts of ownership which are inconsistent with a test made to determine whether it will take the title and become the owner. But in the case at bar, the use was continued for more than a month, passengers were carried and fares collected day in and day out, and the total amount received by the defendant on account thereof, however large, it has never returned or even offered to return to the plaintiff.

The addendum to the twenty-first finding will not serve to extricate defendant from the position of having accepted the cars as its own property, which such use and benefit compel it to assume. The excluded offer of defendant "to prove that, owing to the insufficiency of the brakes, the cars were run at loss, and that no profit resulted from collection of fares" (p. 35), is not a *fact* actually proved in the case which the Court was authorized to find. The offer of proof was rejected and is not in the case, defendant not having excepted thereto and not being the plaintiff in error here. Besides, under the record which the Court below made, "none of the objections to the admission or exclusion of evidence," noted in the transcript of the evidence taken in the trial when Mr. Justice Brewer, then Circuit Judge, sat with Judge Philips, "were called to the attention of the Court (which tried the case and rendered the judgment from which the writ of error herein is prosecuted), nor was its decision or judgment thereon asked, nor was any such decision or judgment given or rendered by the Court." (p. 200.) Hence, the insertion of such an *unproved fact* in the finding will hardly save the defendant in this Court from the consequences of having employed the cars for its own private purposes, in the prosecution of its business, from which it derived a pecuniary benefit, which is still in its treasury. In addition to all this,

the very loss in the operation of the cars, to which its so-called offer of proof pertains, and which is not a matter of legal damages, was asserted in its answer by way of counter-claim, to the amount of $75,000, without any credit whatever for fares collected, which counter-claim was entirely disallowed by the lower Court.

If the sanctity of contracts is to be preserved; if the rights of parties are to be measured by the agreements into which they have voluntarily entered; if they are to be bound by their acts done thereunder, this Court should reverse the judgment of the Court below and direct a judgment to be entered in favor of the plaintiff.

JOHN S. RUNNELLS,
WILLIAM BURRY AND
GARDINER LATHROP,
Attorneys for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
DEC 17 1894
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CLERK.

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154-94

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 146.

PULLMAN'S PALACE CAR COMPANY,
Plaintiff in Error.

vs.

METROPOLITAN STREET RAILWAY COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR DEFENDANT IN ERROR.

WALLACE PRATT,
FRANK HAGERMAN,
Attorneys for Defendant in Error.

Tiernan-Havens Printing Co., Kansas City.

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BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

The plaintiff in error, Pullman's Palace Car Company, brought suit in the court below against the defendant in error, the Metropolitan Street Railway Company, to recover the contract price of $50,000 for building twenty-five combination cars for the defendant, and also the sum of $4,219.70 for extra work claimed outside of the contract.

The principal defense was that there was an implied

warranty on the part of the plaintiff, the manufacturer, that the cars should be reasonably fit for the use for which the plaintiff knew they were ordered built, that there was a breach of this warranty, and that defendant within a reasonable time rescinded the contract. Defendant also set up a counter claim.

The issues so joined first came on for trial at the March term, 1889, of the court below before Mr. Justice Brewer, then Circuit Judge, and District Judge Philips, a jury having been duly waived.

The evidence and the proceedings on that trial were taken down by a stenographer and by him duly transcribed and the case was submitted, but not decided at the time Circuit Judge Brewer resigned his office to accept the appointment of Justice of this Court.

Afterwards, at the September Term, 1890, of the said Circuit Court, the cause came on for trial before the Court, the Hon. Henry C. Caldwell, Circuit Judge, and the Hon. John F. Philips, District Judge, sitting, and thereupon the former submission was by consent set aside, a jury was duly waived by written agreement, and by consent of the parties the presentation in Court of the witnesses was waived, and the said stenographer's transcript of the evidence and the proceedings upon the former hearing read as the evidence on this second and final trial; but none of the objections to the admission or exclusion of evidence, as in said transcript noted, was called to the attention of the Court, nor was its decision or judgment thereon asked, given or rendered, nor any exceptions thereto taken or saved (printed record, page 200). The Court below, after hearing the evidence and argument of counsel, took the case under advisement, and afterwards, at the same term, filed a special finding of facts (Rec. 217), all of which are fully sustained by the evidence, together with declarations of law, as follows:

Special Findings.

"Be it remembered that when this case came on for trial the parties waived a jury and by agreement in writing filed with the clerk, agreed to try the issues of the case before the Court. Whereupon the Court proceeded to hear the evidence and after due consideration thereof, makes and declares the following special findings of facts thereon:

1st. The plaintiff for a long time prior to the transactions now in controversy was and has ever since been a corporation extensively engaged among other things in the manufacture and construction of cars including cars for street cable railways at Pullman, Illinois.

2nd. The defendant for a long time prior to the matters in controversy was and ever since has been a corporation organized under the laws of the State of Missouri engaged in the operation of street railway lines, including what is known as cable lines, in Kansas City, Missouri, and Kansas City, Kansas.

3rd. Prior to May 13th, 1887, defendant, preparatory to the operation thereof, was engaged in the construction of a double-track railway in Kansas City, Missouri, extending from the eastern city limits a long distance along Twelfth street to Bell street, at the western limits of the city, and upon said Bell street to the stock-yards, thence back on Genesee street to Twelfth and on to the eastern city limits.

4th. The maximum grade of this line is thirteen and fourteen per cent., that is thirteen and fourteen feet ascent in a distance of 100 feet. This grade was five hundred to six hundred feet long. On the line there were a number of grades running up to ten per cent. There were also on the line a number of sharp curves. This line was known as defendant's Twelfth street line.

5th. On May 15th, 1887, the roadbed being constructed and track laid, defendant's chief engineer wrote the following letter to the agent of complainant, to-wit:

"KANSAS CITY, MO., May 13th, 1887.

Mr. Chas. Pullman,

Pullman Palace Car Co., Pullman, Ill.

Dear Sir:—We write to say that we are now ready to talk cars for our Wyandotte and 12th street lines, and should be glad to have you call on us at your convenience.

Yours truly,

KNIGHT & BONTECOU,

Chief Engineers."

6th. Pursuant to this letter, Mr. Chas. Pullman, the general agent, of plaintiff, came to Kansas City in person for the purpose of discussing the subject matter of the proposed contract and preliminaries connected therewith.

7th. While in Kansas City said Pullman was on the ground, and whilst not going over the line of the track, had a general knowledge of the grades and curves thereof. Thereafter he returned to the City of Chicago, from which place plaintiff sent a letter to the defendant in the following words:

"CHICAGO, June 21st, 1887.

Chas. F. Morse, Esq.,

President Metropolitan Street Railway Co., Kansas City, Mo.

Dear Sir:—I beg to enclose herewith contract with specifications attached, executed by me in duplicate, for the building of twenty-five (25) Combination Closed and Open Street Cars for your company. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank, and I would be glad if

you would indicate on the specifications returned, the lettering you desire applied to the cars.

Very respectfully,

GEO. W. BROWN,
General Manager.

Two Enclosures."

The contract and specifications contained in the foregoing letter are in the words and figures following:

"AGREEMENT.

CHICAGO, ILLS., June 14th, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.:

Gentlemen:—Pullman's Palace Car Company will build for the Metropolitan Street Railway Company, twenty-five (25) combination closed and open cable cars, as per general specifications attached hereto and made a part of this agreement, and deliver the same f. o. b. Pullman Junction of Kensington, Ills., on or before October 10th, 1887, delays by fires, strikes and unavoidable hindrances excepted, for the sum of Two Thousand ($2,000.00) dollars each.

Terms, cash on deliveries.

Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

[Executed in duplicate.].

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN,
General Manager.

Accepted June 27, '87.

METROPOLITAN STREET RAILWAY COMPANY,
By KNIGHT & BONTECOU,
Chief Engineers.

PULLMAN'S PALACE CAR COMPANY,
PULLMAN CAR WORKS.

PULLMAN, ILL., June 14, 1887.

GENERAL SPECIFICATIONS.

For twenty-five (25) combination cars, Lot . . . , Plan 510.

For account of Metropolitan Street Railway Co.

Ground Plan — Length, 34 feet, 9 inches over all, width, 6 feet, 6 inches or more over sills.

Framing — Height from top of sill to under plate . . .

Flooring — Pullman Std.

Style of Outside — Number of windows each side, 8; number of windows each end, 2.

Roof. . . .

Hood. . . .

Window Sash, Cherry.

Glass, D. T. French, size. . . .; lower. . . .; upper. . . .

" in clear story, embossed, size. . . .

" in doors, D. T. French, size. . . .; lower. . . .; upper. . . .

Blinds.—Cherry frames, Basswood slats.

Ceiling, Mahogany; Decoration. . . .

Inside finish, same as 16 ft. cars recently built.

Seat ends. . . . Seating capacity. . . .

Seats and backs, same as 16 ft. cars recently built.

Seat and Back Springs. . . . .

" " Covering, Wilton Plush Carpet.

Trimmings, Bronze.

Lamps, Center, 2 in closed & 1 in open part.

" Bracket, None.

Water Cooler, "

Heater, "

Saloons, "

Locks, "

Body Colors. Same as 16′ Cars recently built.

Decoration. Suitable design.

Lettering. . . . .

Numbers. From 200 to 224 inclusive.

Names. None.

Platforms, 3 feet 9 inches, per sketch, with one gate on left hand side.

Height from top of rail to center of drawbar. . . .

Colors, same as 16′ cars recently built.

Drawer Springs. . . . .; buffer springs. . . .

Brakes, to be operated by gripman with lever, both trucks.

Brake power. . . .

Sand boxes to be applied on front truck at center.

Trucks, Pullman standard for cable cars.

Gauge 4 feet 8½ inches.

Wheel base of truck; rear truck 4 feet; front truck short as possible to admit grip.

Colors. . . .

Wheels, Fulton foundry.

Axles, 3½-inch iron.

Springs, Bolster. . . . .; pilot on front truck.

" Equalizer, Vose.

Pedestals, Bemis; wire guards on side.

Oil boxes "

Oil box lids "

Brake shoes, Congdon flange.

Journal bearings, Bemis.

REMARKS.—Extra brakes on rear trucks operated by brakemast with wheel at rear end platform."

8th. The defendant executed said contract as shown in the copy, and returned one copy of the same with a letter as follows:

"KANSAS CITY, Mo., June 27th, 1887.

The Pullman Palace Car Co.,

G. F. Brown, Gen'l Mang'r, Chicago, Ill.

Dear Sir:—Your letter of the 21st enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th street line addressed to our president Morse has been referred to us for attention in his absence, and we enclose you with this one copy duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the general plans which Mr. Pullman, when here, promised to let us have.

Yours truly,

(Sgd) KNIGHT & BONTECOU,

Chief Engrs."

9th. Between the first and sixteenth of July, 1887, the plaintiff's engineer, Mr. Twyman, visited Kansas City, stating that the general purpose of his visit was to determine upon the general features of the cars, to determine what was the shortest curve and other physical conditions of the road, to determine the radius of the shortest curve it would have to go round, and to arrange with reference to the outside width and the extra length over all, the relative position of the trucks, the height of the wheels, the steps and the seats and the distance between the seats, etc. He was at the office of the defendant's engineer for some time and had access to the plans and profiles of the road, and while in Kansas City the following specifications were submitted by defendant's engineer:

"SPECIFICATION.

KANSAS CITY, Mo., July 16th, 1887.

Combination cars for Metropolitan Street Railway Co.

Length to be 38 feet over all.

Width—8 ft. 3 in. over all.
Width of floor frame, 7 ft. 3 in.
Height from top of track to top of floor, 2 ft. 3 1–2 in.
Distance between centres of trucks, 20 feet 0 inches.
Wheel base of truck, 4 feet 8 inches. .
Distance from front of car to center of forward truck, 4 ft. 9 in.
Length of closed part of car, 20 ft. inside.
Length of open portion, 8 ft. 9 in.
Rear Platform, 3 ft. 7 in.
Size of wheels, 22 in. diameter.
16 cross seats to be fixed as decided.
Approved July 16th, 1887.

(Sgd) KNIGHT & BONTECOU,
Engineers."

10th. Thereafter the plaintiff proceeded with the construction of the cars. The defendant gave no direction in relation to the brakes on the cars, otherwise than that they should be extra heavy and extra powerful, nor were any plans or specifications of brakes furnished to the defendant during their construction. The brake put upon these cars was designed and constructed by Mr. Twyman, plaintiff's engineer.

11th. In December, 1887, in response to plaintiff's request that defendant send one of its employees to Pullman to inspect the cars, E. J. Lawless, defendant's superintendent, went there for that purpose. Ten or twelve cars were then shown as completed and standing in the shops of plaintiff on the floor, where they were run out. Said Lawless made a thorough examination of said cars, inside and out, and examined the brakes by having them worked from within and observing their operation and application while under and at the side of the car, and announced himself as satisfied therewith, and requested the

representative present of the plaintiff to finish the others up in the same way and forward them without more. No further request was made by said Lawless for testing said cars, and no other facilities were offered by the plaintiff for making such test and examination.

12th. The first five cars were shipped by plaintiff February 24, 1888. The next shipment of eight cars was on March 1st, 1888. The next shipment was of two cars, March 17, 1888. Five cars were shipped March 27th, 1888, and the remainder on the 30th day of March, 1888.

13th. The cars when they reached Kansas City were stored in defendant's power house as the eastern extension of defendant's railroad was not then in readiness for operation. These cars were taken into the house by passing over a curved track from the street. This curve was 30 ft. radius. When the first lot of cars were being passed around this curve it was found that the wheels bound against the sills. Thereupon defendant's engineer telegraphed plaintiff as follows: "Forward truck of cars will not pass around 30-foot radius curve. Lengthen stay chains and cut away lower corner of middle sills." To which plaintiff answered: "Telegram received. Will make alterations requested."

14th. On the 22nd of March, 1888, before all the cars had been shipped, the east end of the 12th street line was completed so a car could run over that part of the line. Defendant's Superintendent took out one of the cars for trial, when difficulty about the brakes of the cars manifested itself, which difficulty was this: When the brakes were so adjusted that they could be used to stop the car on a straight level track, in passing around a curve or up a grade they would bind against the wheels causing them to slip and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight level track

so as to stop the cars. On the 23rd day of March, 1888, defendant sent plaintiff the following letter:

"KANSAS CITY, Mo., 23 Mch., 1888.

Geo. F. Brown, Esq., Gen. Mgr.:

Dear Sir:—We tried one of your cars over the line yesterday and found that the brakes would not work satisfactorily, in fact were perfectly useless,—I think the reasons for this are: there being so many connections and consequently so much lost motion that before the shoes hug the wheels, the brake lever comes to the limit of the quadrant.

Before starting out with the car we adjusted the brakes so that the shoes touched the wheels, but notwithstanding this we could not lock the wheels, or even hold the cars on the lightest grades.

As a perfect working brake is an imperative matter with us, I would like to hear from you on the subject, and what remedy you propose. Yours truly,

EDW. J. LAWLESS."

In response to this letter Mr. Twyman, plaintiff's engineer, came at once to Kansas City, and attempted to remedy the trouble with the brake, and on leaving claimed that he had done so.

15th. On April 5, 1888, the plaintiff sent the following letter to defendant:

"PULLMAN'S PALACE CAR COMPANY,
GEO. F. BROWN, General Manager.

General Manager's Office,
CHICAGO, April 5th, 1888.

C. F. Morse, Esq.,
President Metropolitan Street Ry. Co., Kansas City, Mo.:

Dear Sir:—The entire lot of 25 cars have been delivered, 18 of them having been shipped in February. Bills

have been rendered your company for the amount of $50,000.00, being the original contract price without extras, bills for which will be sent your auditor in a few days.

Will you kindly direct a prompt remittance for the bills already rendered, and oblige,

Very respectfully,

GEO. F. BROWN,

Dictated." General Manager.

S.

And on or about the 7th or 10th day of April, 1888, defendant's whole line was ready to be opened, when the cars for the first time were placed on the line. This was shortly after Mr. Twyman had left Kansas City. Upon the recurrence of the trouble in operating the cars, defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., April 11th, 1888.

George F. Brown, Esq.,

Gen'l. Mgr. Pullman Palace Car Co., Chicago, Ill.

DEAR SIR:—I have delayed answering your letter of April 5th, for some days as I wished to see your cars in practical operation before making a reply.

The Twelfth street cable line has been running since Saturday, and we should now be operating with a full equipment, if we had not been obliged to make constant repairs and changes to the car brakes.

These are very unsatisfactory, and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes.

I will make no attempt to go into this matter in detail, but wish to say that I shall insist on these cars being made

right in this respect before I should be willing to approve your bills.

If you will send a practical man here to take charge of these necessary changes, it will be the best plan, otherwise we shall be obliged to make them and charge you with the expense.

There are some other things about the cars which are not as they should be, but which do not interfere with the operation of them. Many of the panels are badly cracked, and the painting on part of the cars, at least, is very poorly done. The attention of your engineer was called to these points, and he admitted that the work was not as it should be.

I have no desire to delay the settlement of your bills, and would gladly approve vouchers for them to-day if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from you in regard to what action you will take as to the brake repairs at your earliest convenience, and oblige

Yours truly,

C. F. MORSE, President."

To which plaintiff sent the following letter:

"CHICAGO, APRIL 13th, 1888.

C. F. MORSE, ESQ.,

President Metropolitan St. Ry. Co., Kansas City, Mo.:

Dear Sir: Your favor of the 11th inst. received and noted. I regret to hear that you are having any further trouble with the brakes on the Combination Cars, as our engineer reported on his return, that the trial made on the brakes on one of the cars while he was there, after some slight changes had been made, proved entirely satisfactory, and there was every reason to suppose that with these

little changes the brakes would work well on the remaining cars.

I regret that your engineer or superintendent did not wire us of the situation as indicated in your letter, as we would have sent our engineer over immediately. As it is he will leave for Kansas City to-night, and I trust that in conjunction with your people the defects reported can be easily remedied.

Our engineer did report on his return that the paint was acting badly on a portion of the new cars, and we are sending out two experienced men to attend to the paint work on such of the cars as require it.

It is proper to explain just here that the defect seems to be with the middle panel which is painted with what is called "crimson lake," and which is one of the most difficult colors to hold.

We regret exceedingly that there has been any trouble in this regard, and you may rest assured that the defects will be remedied without expense to your company. Speaking of the paint reminds me that our people report that the alkali water is very severe on the finish of your cars, as we know from our own experience with sleeping cars where alkali water is used.

Another suggestion in this connection I beg to make is that if your people would take the new cars in shop within about four or five months after they are received, and give the paint a thorough cleaning, and then two coats of varnish, they would run for at least a year without having to be varnished again, and it would also preserve the life of the paint.

Very respectfully.

GEO. F. BROWN,
General Manager."

Immediately thereafter the engineer Twyman, came to Kansas City to look after the trouble in question and did

some work on the brakes while here, but being called away by letter or telegram, he left for Chicago stating that he would soon return and complete the work. Instead of so doing he wrote a letter saying "I am sorry not to be able to return to Kansas City as quickly as I anticipated. We have, however, arranged to send you a man immediately who will take charge of the necessary alterations on your cars. There will be no necessity for his leaving Kansas City until everything is arranged to your satisfaction, and I will probably come out there again towards the end of the week." Immediately following this letter plaintiff's mechanic, named Overtoom, came with typewritten instructions from Mr. Twyman and went to work to remedy the defect in the brakes. He went over the cars one by one and as he thus went over them pronounced them ready for service. This mechanic stated that he had done all he could do to remedy the difficulty in question and if it did not accomplish that end he did not know how to remedy it. Notwithstanding the work and effort of this mechanic the same difficulty thereafter continued to manifest itself in the operation of the cars as to the working of the brakes. Thereupon defendant's president wrote plaintiff the following letter:

"KANSAS CITY, MO., May 12th, 1888.

George F. Brown, Esq.,

Genl. Manager Pullman's Palace Car Co., Chicago, Ill.

Dear Sir:—I have delayed corresponding with you farther in regard to the 12th street cars, until your mechanic had finished his work. The result of this work has been very little material improvement in the action of the brakes, and the cars at no time during the progress of the repairs have been in a satisfactory condition to operate and are not in such condition now.

This fact has been reported to the board of directors,

which has to-day passed a resolution rejecting the 25 cars furnished by your company for 12th street, on account of the imperfect brakes, and other seriously objectionable features, and has instructed me to notify you to this effect, and that the cars are subject to your order. I am,

Yours respectfully,

C. F. Morse, President."

To which plaintiff made the following answer:

"Pullman's Palace Car Company,
G. F. Brown, General Manager.

General Manager's Office.

Chicago, May 17th, 1888.

C. F. Morse, Esq.,

President Metropolitan Street Ry. Co., Kansas City, Mo.:

Dear Sir:—Your letter of the 12th inst., relating to the twenty-five combination cars built by this company for your company, has been received and noted.

You are cognizant of the fact that the cars were built according to plans approved by your chief engineer, the material used, as well as the workmanship, being first-class in all respects.

The cars before shipment were inspected and accepted by your General Superintendent. The cars were then shipped to, received and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car, your officers pronounced them satisfactory. Thereupon the brakes were in like manner examined and adjusted on the remaining cars, all the cars then being in use by your company.

In view of the facts, your present statement to the effect that you reject the cars on account of "imperfect brakes and other seriously objectionable features" is quite astonishing, and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim.

I have to request, therefore, that you will without further delay remit the amount due this Company for said cars, as per bills heretofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us.

Very respectfully,

GEO. F. BROWN,
General Manager."

16th. The cars could not be operated successfully on defendant's railroad track for which they were designed, with this brake nor upon similar lines, and this defect or inability in the brake was not apparent nor discoverable upon any reasonable inspection made at the place of their manufacture and could not be discovered without a practical test on the defendant's railroad track or over like track. The defect in the brake was a latent one which did not and could not develop to the observation on inspection and was only discoverable when put into use on the defendant's track or similar track.

17th. The defendant paid the freight and drayage on said cars from Chicago to Kansas City, the sum of $1088.50, and paid for building house in which to store the rejected cars, $1850.00.

18th. After the sending of the letter by defendant's president to the plaintiff, informing it that the cars were rejected and were at plaintiff's disposal, the defendant

built a car house at or near Kansas City and stored therein these cars, where they have ever since remained.

19th. The defendant operated upon its said road combination cars of a similar character, weighing about six hundred pounds less than the cars in controversy, which were manufactured by the Laclede Car Company of St. Louis, Missouri, and were operated by a brake of a different pattern costing from seventy-five to one hundred dollars apiece.

20th. The defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith.

21st. During the time defendant run the cars on its road, during the tests made as hereinbefore found, passengers were received thereon and fares collected from them by defendant. The successful running of the trains was frequently interrupted by breaking of the cable and the locking of the car wheels in consequence of the defective construction of the brakes, and defendant so continued in the attempt to run said cars during the time of plaintiff's promises to repair the alleged defect, and on such trips received on board of said cars passengers and collected from them the customary fare. On the trial defendant offered to prove that, owing to the insufficiency of the brakes, the cars were run at loss, and that no profit resulted from the collection of fares. On plaintiff's objection this testimony was by the Court excluded.

22d. Defendant had in its employ during the time in question two engineers of skill and experience, one of them, Mr. Lawless, the same person who went to Chicago to inspect the cars at plaintiff's yards, had experience in the construction and practical operation of cable cars in

San Francisco, California, prior to the time of taking service from defendant.

To the findings of the foregoing facts and each of them, and the declaration of law arising thereon, the plaintiff at the time duly excepted and still excepts.

Upon the foregoing facts, the Court on its own motion declared the law of the case to be: That the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner set out in the foregoing special findings of facts; and that the defendant rescinded said contract in accordance with its legal right so to do, and made a lawful tender of said cars to the plaintiff, and is not liable to the plaintiff for the contract price of said cars or any other sum; and that the defendant is entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City, amounting to the sum of one thousand, eighty-eight and $\frac{50}{100}$ dollars for which judgment will be entered. To which declarations of law upon the facts found as aforesaid and to each and every one of them separately, the plaintiff by its attorneys at the time excepted; and the plaintiff asked the Court to declare the law upon the finding of facts aforesaid to be with the plaintiff and that the plaintiff was in law upon the facts found entitled to recover from the defendant the contract price for said cars with interest, which declaration of law the Court refused to make, to which ruling of the Court the plaintiff by its attorneys at the time excepted, and the Court now here signs and seals the finding of facts and the said plaintiffs' several exceptions to the rulings of the Court and orders that the same be spread upon the record, and made part of the record of this cause."

The Court thereupon rendered judgment for the defendant upon each of the four counts of the petition, dis-

missing the same, and upon the defendant's counter claim rendered a judgment in its favor against plaintiff for the sum of $1088.50. (Printed record p. 36.) No error has been assigned in the rendition of the judgment upon defendant's counter claim.

POINTS.

I.

For all the purposes of review in this Court the facts as found and stated by the Court below are conclusive.

U. S. Revised Statutes, Sec. 649.
Boogher vs. Ins. Co., 103 U. S., 90–97.
Dickinson vs. The Planters' Bank, 16 Wal. 257.
Town of Ohio vs. Marcy, 18 Wal. 552.
Saulet vs. Sheperd, 4 Wal. 502.
Copelin vs. Ins. Co., 9 Wal. 461.
Ins. Co. vs. Falsom, 18 Wal. 237.
Ins. Co. vs. Sea, 21 Wal. 158.
U. S. vs. Dawson, 101 U. S. 569.
Tyng vs. Grinnell, 92 U. S. 467.
Martinton vs. Fairbanks, 112 U. S. 674.
Ft. Worth City vs. Smith Bridge Co., 151 U. S. 294.

II.

No rulings having been made by the Court below and excepted to upon objections to the admission or exclusion of evidence, the only question for review by this Court is as to the sufficiency of the facts found to support the judgment.

U. S. Revised Statutes, Sec. 700.
Boogher vs. Ins. Co., 103 U. S., 90, 97.

III.

There was an implied warranty on the part of the plaintiff that the cars, when manufactured and applied to the use contemplated by defendant and understood by plaintiff at the time of making the contract, should be reasonably fit for that use.

Kellogg Bridge Co. vs. Hamilton, 110 U. S. 108, and cases cited.
R. R. Co. vs. Smith, 21 Wallace, 255, 439 and note.
Reynolds vs. Palmer, 21 Fed. Rep. 433.
Craver vs. Hornberg, 26 Kans. 94.
Newmark on Sales, Secs. 351–352.
5 Wait's Actions and defenses, Secs. 562–565.
Phila., etc., Co. vs. Hoffman (Pa.), 4 Atl. Rep. 848.
Curtis & Co. Mnfg. Co. vs. Williams, 48 Ark. 325, s. c., 3 S. W. Rep. 517.
Rodgers vs. Niles, 11 Ohio St. 48.
1 Parsons on Contract, (5th Ed.), 586.
2 Benjamin on Sales, (Corbin's Ed.), Sec. 966, page 843.

Sec. 988, page 865 and note 35. Sec. 993, page 867 and Sec. 994, page 868.

Best vs. Flint, 58 Vt., 543 s. c., 5 Atl. Rep. 192 and note.

Downing vs. Dearborn, 77 Me., 457 s. c., 1 Atl. Rep. 407.

Briggs vs. Hilton, 99 N. Y. 517–529.

Hoult vs. Baldwin, 67 Cal. 610, s. c., 8 Pac. Rep. 440.

1 Chitty on Contracts, 417.

Beals vs. Olmstead, 24 Vt. 114.

Correio vs. Lynch, 65 Cal. 273, s. c., 3 Pac. Rep. 889.

IV.

The provision in the contract for an inspection and acceptance of the cars at works of the plaintiff does not apply to defects discoverable only by actual use.

(a) It is the only just and reasonable construction that can be given to the contract.

Noonan vs. Bradley, 9 Wal., 394, 405.

2 Wharton on Contracts, Sec. 654, 672.

Story on Sales (4th Ed.) Sec. 354.

2 Wharton on Contracts, Sec. 641, note 1, citing Dr. Lieber's rules in his Hermeneutics, 136-7.

(b) It is the construction placed upon the contract by the parties themselves.

Chicago vs. Sheldon, 9 Wal., 50, 54.

Foster vs. Goldschmidt, 21 Fed. Rep., 70.

Wald's Pollock on Contracts, 403.

2 Wharton on Contracts, Sec. 653.

V.

Even if we are wrong in our construction of the contract, yet the fact that the contract provided for an inspection at the works does not exclude the implied warranty of the manufacturer if the defect was only discoverable by use on the Twelfth Street line.

Heilbutt vs. Hickson, L. R. 7 C. P., 438.
2 Benjamin on Sales (Corbin's Ed.) Sec. 975, 976, 985, 986, 987, 988, 989, 994, 995.
Bird vs. Smith, 12 Q. B. 786.
Blackburn on Sales (2nd Ed.) 210.
Story on Sales (4th Ed.) Sec. 369, 375.
Craver vs. Hornburg, 26 Kas., 94, 95.
Kellogg Bridge Co. vs. Hamilton, 110 U. S., 108, 117.
Boothby vs. Scales, 27 Wis., 626, 633.
Hudson vs. Ross, 72 Mich., 363 s. c., 40 N. W. Rep., 467.
Gould vs. Stein, 149 Mass., 570 s. c., 22 N. E. Rep., 47, 49.

VI.

The fact that the work was done under specifications does not exclude the idea of an implied warranty.

VII.

For a breach of the implied warranty the defendant, within a reasonable time, could elect to rescind the contract.

Craver vs. Hornburg, 26 Kansas, 94.

Weybrich vs. Harris, 31 Kansas, 92.
Branson vs. Turner, 77 Mo. 489.
Johnson vs. Whitman, etc., Co., 23 Mo. Ap. 100.
Howe Machine Co. vs. Rosine, 87 Ill. 105.
Rogers vs. Hanson, 35 Ia. 283.
Morse vs. Brackett, 98 Mass. 209.
Hyatt vs. Boyle, 5 Gill. & J. (Md.) 121.
Marston vs. Knight, 29 Me. 341.
Doll vs. O'Ferrell, 45 Ind. 268.
Butler vs. Northumberland, 50 N. H. 33.
Youghiogheny Iron Co. vs. Smith, 66 Pa. St. 340.
Jegers vs. Guffin, 43 Miss. 134.
Ralph vs. Chicago, etc., Co., 32 Wis. 177.
1 Wharton on Contracts, Sec. 282.
Curtis, etc., Co. vs. Williams, 48 Ark. 325, s. c. 3 S. W. Rep. 517.
Hoult vs. Baldwin, 67 Cal. 610, s. c., 8 Pac. Rep. 440.
Polheumas vs. Herman, 45 Cal. 573.
Downing vs. Dearborn, 77 Me. 457 s. c., 1 Atlantic Rep. 407
Correio vs. Lynch, 65 Cal. 273 s. c., 3 Pac. Rep. 889.
Mandel vs. Buttles, 21 Minn. 391.
Prickett vs. McFadden, 8 Ill. Ap. 197.
Matthews vs. Fuller, 8 Ill. Ap. 529.
Kent vs. Burnstein, 12 Allen 342.
Culler vs. Gilbreth, 53 Me. 176.
Jack vs. R. R. Co., 53 Iowa 399.
Natn'l Bank, etc. vs. Dunn, 106 Ind. 110.
Baker vs. McAllister, 2 Wash. Ty. 48.
Warder vs. Fisher, 48 Wis. 338
Scranton vs. Tilley, 16 Tex. 183.
Pope vs. Allis, 115 U. S. 363.

VIII.

The non-compliance with a condition of a contract will always authorize a rescission.

1 Wharton on Contracts, Secs 561, 566.
Foggs, Adm'r, vs. Rogers 84 Ky. 558 s. c., 2 S. W. Rep. 248.
Wolcott vs. Mount, 36 N. J. Law 265.
Bagley vs. Cleveland Rolling Mill Co., 21 Fed. Rep. 159.
Norrington vs. Wright, 115 U. S. 188.
Filley vs. Pope, 115 U. S. 213.
2 Benj. on Sales, (Corbin's Ed.) page 799, 800, Secs. 918, 919 and note.
Story on Sales, (4th Ed.) Sec. 422, Note 2.

IX.

Where an article is ordered from a manufacturer upon an executory contract, there is the implied warranty before mentioned, and this is a condition of the contract which will warrant a rescission for a breach.

2 Benjamin on Sales (Corbin's Ed.), Secs. 1347, 1350, pp. 1150–1152.
Story on Sales (4th Ed.), 422, note 2.
Howard vs. Hoey, 23 Wendell 350.
Voorhees vs. Earle, 2 Hill 288.
Miller vs. Eno, 14 N. Y. 597.
Street vs. Blay, 2 Barn. & Ad. 456.
Cook vs. Boddeliou, 1 Cress. & K. 561.

Saunders vs. Jamesbn, 2 Cress. & K. 557.
Heilbutt vs. Hixon, L. R. 7 C. P. 438.
2 Schouler on Personal Property, 324, 325, 364, 365 and 608.
Parks vs. Morris, etc. Co., 54 N. Y. 586.
Brigg vs. Hilton, 99 N. Y. 517, 529.
Norton vs. Dreyfuss, 106 N. Y. 90.

The distinction as to an implied warranty by a manufacturer upon an executory contract is too refined to be clearly drawn.

Bagley vs. Cleveland Rolling Mill Co., 21 Fed. Rep. 159.
Wolcott vs. Mount, 36 N. J. Law 165.
2 Benjamin on Sales (Corbin's Ed.), pp. 799, 800, Secs. 918, 919 and note.
2 Schouler Personal Property, 354 and 609.
Pope vs. Allis, 115 U. S. 363.

X.

The receipt of the cars does not prevent the return, whether considered as a rescission on account of the breach of the warranty, or a rejection on account of a breach of a condition.

Norrington vs. Wright, 115 U. S., 188.
2 Benjamin on Sales (Corbin's Ed.), Sec. 1350, p. 1153, and Sec. 1050, p. 916.
Craver vs. Hornburg, 26 Kansas, 94.
Branson vs. Turner, 77 Mo., 489.
Boughton vs. Standish, 48 Vt., 594.
Knoblanch vs. Kronschnable, 18 Minn., 300.
Simpson vs. Krumdick, 28 Minn., 352.
Doane vs. Dunham, 79 Ill., 131.

Hoult vs. Baldwin, 67 Cal., 610, s. c., 8 Pac. Rep., 440.
Curtis Manfg. Co. vs. Williams, 48 Ark., 325, s. c., 3 S. W. Rep., 517.
Dawes vs. Peebles, 6 Fed. Rep., 856.
Bryant vs. Isburgh, 13 Gray, 607-611.

Especially is the right to rescind or reject not lost when the failure so to do comes from the assurances of the vendor.

Courtney vs. Bowles, 65 Mo., 196.
Day vs. Poole, 52 N. Y., 416.
Matthew vs. Fuller, 8 Ill. Ap., 529.

XI.

A mere offer to return is a sufficient rescission.

Howard vs. Hoey, 23 Wend. 350.
2 Benjamin on Sales (Corbin's Ed.), 1151, Sec. 1347.
Grimoldy vs. Wells, L. R. 10 C. P. 391.
Curtis Mfg. Co. vs. Williams, 48 Ark,, 325 s. c., 3 S. W. Rep. 517.
Matthews vs. Fuller, 8 Ill. App. 529.
2 Kent's Com. 480.
2 Schouler on Personal Property, 610.
Padden vs. Marsh, 34 Iowa, 522.

And the vendor will be put in statu quo if the chattel is returned injured, if not injured by the buyer's negligence.

2 Kent Sec. 480, Note (c), citing Head vs. Tattersall, 41 L. J. (N. S.) Ex. 4 L. R., 7 Ex. 7.
2 Schouler on Per. Property, 313.

ARGUMENT.

I.

The first point made by the defendant in error,

"*That for the purposes of review by this court the facts as found and stated by the court below are conclusive,*" is fully sustained by the provisions of the United States Revised Statutes upon the subject, and by many decisions of this court construing the same.

Sec. 649 (Revised Statutes U. S.) provides:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Sec. 700 provides:

"When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to Sec. 649, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal, and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment."

In Boogher vs. Ins. Co., 103 U. S., 90, 97, Mr. Chief Justice Waite, delivering the opinion of this Court, said:

"We have often held that the act of 1865 (Sec. 649, 700, Rev. Sts.) does not permit us to consider the effect

of the evidence in the case, but only to determine whether the facts found on the trial below are sufficient to support the judgment, and to pass on the rulings of the Court in the progress of the trial presented by bill of exceptions. *For all the purposes of our review, the facts as found and stated by the Court below are conclusive.*"

And in Ft. Worth City Co. vs. Smith Bridge Co., 151 U. S., 294, Mr. Chief Justice Fuller, delivering the opinion of the Court, said:

"This case having been tried by the Court under the statute, we can only inquire whether the facts found in the special findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon rulings on matters of law properly preserved by bill of exceptions."

This rule of practice disposes of a great number of the many assignments of error filed herein, and as the bill of exceptions shows that no rulings were made by the Court below during the trial, and excepted to, upon objections to the admission or exclusion of evidence, the only question for review by this Court is whether the facts as found will support the judgment.

That part of the bill of exceptions referred to above is on page 200 of the printed record and is as follows:

"This cause formerly came on for hearing at the March Term, 1889, of this Court before Hons. David J. Brewer, Circuit Judge, and Jno. F. Philips, District Judge, a jury having been waived by stipulation in writing. The evidence on that hearing and the proceedings were taken down by a stenographer and transcribed by him. At the trial of this cause before Hons. Henry C. Caldwell, Circuit Judge, and Jno. F. Philips, District Judge, by consent of parties, the presentation in Court of the witnesses was waived and the said transcript of evidence, with the proceedings as therein detailed, was read as the evidence in the cause and is as above set out, but none of the objections

to the admission or exclusion of evidence as in said transcript noted were called to the attention of the Court, nor was its decision or judgment thereon asked, nor was any such decision or judgment given or rendered by the Court, and no exceptions thereto were taken or saved."

II.

There was an implied warranty on the part of the plaintiff that the cars, when manufactured and applied to the use contemplated by defendant, and understood by plaintiff at the time of making the contract, should be reasonably fit for that purpose.

The general rule of law with respect to implied warranties is, that when the manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller thereby warrants it reasonably fit and proper for such purpose and free from latent defects, and that, if owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on his implied warranty. The authorities are collated under point III, *supra*.

Mr. Benjamin, in his work on Sales (Corbin's Ed'n.) at Sec. 966, states the rule thus:

"So far as an ascertained specific chattel, already existing, and which the buyer has inspected, is concerned, the rule of *caveat emptor* admits of no exception by implied warranty of quality. But where a chattel is to be made or supplied to the order of a purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the

order is given, as is shown by the authorities now to be reviewed."

And at Section 988 thus:

"Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. Brown vs. Edgington, 2 M. & G. 279; Jones vs. Bright, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own."

And in note 35 to section 988, on page 865, many authorities are referred to as sustaining the text.

And at Sec. 993, Mr. Benjamin says:

"If a man buy an article for a particular purpose made known to the seller at the time of the contract and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose."

In 1 Parsons on Contracts (5th Ed.) 586, it is said:

"If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose."

The cases sustain the proposition that, if the purpose for which the article is to be used be made known to the manufacturer at the time he obtains the contract (whether the notice is contained in the contract or not) then a condition of the sale is the warranty that the article is fit for the purpose for which the purchase is made.

The rule seems to be, that if the manufacturer has the

fact made known to him of the special purpose for which the article is desired, then he impliedly warrants that it shall be fit for that purpose. If he does not know the particular purpose for which the article is to be used, he impliedly warrants it fit for the general use to which such articles are ordinarily put. This is the doctrine of Jones vs. Just, L. R. 3 Q. B. 197, the following language of which is quoted with approval in Kellogg Bridge Co. vs. Hamilton, *supra* [page 114]:

"It must be taken as established that, on the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that, on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it *during the manufacture*, that it shall be reasonably fit for use or shall be merchantable, as the case may be."

If there was a warranty there is no doubt about the breach.

The facts, as found and stated by the Court below, show that the plaintiff in error was an extensive manufacturer of railroad and ordinary street cars and was also a manufacturer of cable railway combination cars; that the defendant was engaged in the operation of cable street railroads in Kansas City, Missouri, and in Kansas City, Kansas, and, prior to May 17, 1887, was engaged in the construction of a double track street cable railway extending through Kansas City, Missouri, from east to west and to the stock yards, and known as defendant's Twelfth Street line, with a maximum grade of 500 or 600 feet of 14 per cent., and with a number of grades running up to 10 per cent., and also with a number of very sharp curves (Findings of Facts Nos. 1, 2, 3 and 4, pp. 217 and 218 printed record); that Charles Pullman, the General Agent for the plaintiff, came to Kansas City at the request of the defend-

ant, for the purpose of discussing the subject matter of a contract for the manufacture of cars for this Twelfth Street line and the preliminaries connected therewith: that while at Kansas City Mr. Pullman obtained a general knowledge of the grade and curves of said Twelfth Street line; that he returned to Chicago and from there, a few days afterwards, the plaintiff sent a letter to the defendant as follows:

"CHICAGO, June 21, 1887.

Charles F. Morse, Esq.,
President Metropolitan Street Railway Co., Kansas City, Mo.

Dear Sir:—I beg to enclose herewith contract with specifications attached, executed by me in duplicate, for the building of twenty-five (25) combination, closed and opened, street cars for your company. Kindly sign and return to me one copy of contract for our files.

You will notice in the specifications that the space for the lettering has been left blank; and I will be glad if you would indicate on the specifications returned the lettering you desire applied to the cars.

Very respectfully,
GEO. W. BROWN,
General Manager."

2 enclosures.

The contract and specifications contained in the foregoing letter are in the words and figures following:

"AGREEMENT.

CHICAGO, ILL., June 14, 1887.

Metropolitan Street Railway Co., Kansas City, Mo.:

Gentlemen:—Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five (25) combination, closed and open, cable cars as per general

specifications hereto attached and made a part of this agreement, and deliver the same f. o. b. Pullman Junction of Kensington, Ills., on or before October 10, 1887, delays by fires, strikes and unavoidable hindrances excepted, for the sum of two thousand ($2000) dollars each.

Terms cash on deliveries. Cars to be inspected and accepted at our works.

Your written acceptance hereof will constitute a contract mutually binding upon both companies.

(Executed in duplicate.)

PULLMAN'S PALACE CAR COMPANY,
By GEO. F. BROWN,
General Manager."

"PULLMAN'S PALACE CAR COMPANY,
PULLMAN CAR WORKS.

PULLMAN, ILL., June 14, 1887.

GENERAL SPECIFICATIONS.

For twenty-five (25) combination cars, lot...., plan 510, for account of Metropolitan Street Ry. Co.

Ground Plan—Length, 34 feet, 9 inches over all, width, 6 feet, 6 inches or more over sills.
Framing—Height from top of sills to under plate ....
Flooring—Pullman Std.
Style of outside—Number of windows each side, 8.
Roof— " " " " end, 2.
Hood—
Window sash, Cherry.
Glass, D. T. French. Size....; lower....; upper....
" in clear story, embossed. Size....
" in doors, D. T. French. Size....; lower....; upper....
Blinds, Cherry frames, Basswood slats.
Ceiling, mahogany; decoration, ...
Inside finish, same as 16' cars recently built.
Seat ends, ...; seating capacity. ....

Seats and backs, same as 16′ cars recently built.
Seat and back springs.
" " covering, Wilton plush carpet.
Trimmings, bronze.
Lamps, center; 2 in closed and 1 in open part.
" bracket, none.
Water cooler, "
Heater, "
Saloons, "
Locks, "
Body colors, same as 16′ cars recently built.
Decoration, suitable design.
Lettering, ...
Numbers, from 200 to 224, inclusive.
Names, none.
Platforms, 3′9″, per sketch, with 1 gate on left hand side.
Height from top of rail to center of draw bars, ...
Colors, same as 16′ cars recently built.
Drawer springs, ...; Buffer springs, ...
Brakes to be operated by gripman with lever, both trucks.
Brake power, ...
Sand boxes to be applied on front truck at center.
Trucks, Pullman st'd for cable cars.
Gauge, 4′, 8 1–2″.
Wheel base of truck, ...; rear truck, 4′ 0″; front truck, short as possible to admit grip.
Colors, ...
Wheels, Fulton foundry.
Axles, 3, 1–2″ iron.
Springs, bolster....; pilot on front truck.
" equalizer, Vose.
Pedestals, Bemis; wire guards on sides.
Oil boxes, "
Oil box lids, "
Brake-shoes—Congdon flange.
Journal Bearings—Bemis.

Remarks.—Extra brakes on rear truck operated by brake mast with wheel at rear end of platform;"

that the defendant executed the contract and returned one copy to plaintiff with a letter as follows:

"KANSAS CITY, MO., June 27, 1887.

The Pullman's Palace Car Co.,
G. F. Brown, General Manager, Chicago, Ills.:

Dear Sir:—Your letter of the 21st enclosing contracts and specifications in duplicate for the 25 combination cars for our 12th street line, addressed to our President, Morse, has been referred to us for attention in his absence, and we enclose you with this one copy duly executed by us on behalf of the company.

Will you kindly advise about when we may expect to get the general plans which Mr. Pullman when here promised to let us have. Yours truly,

[Signed.] KNIGHT & BONTECOU,
Chief Eng'rs."

(Findings of Fact, Nos. 5, 6, 7 and 8, pp. 218, 219 and 220 printed record); that between the 1st and 16th days of July, 1887, plaintiff's engineer, Mr. Twyman, visited Kansas City to determine upon the general features of the cars, to ascertain what was the shortest curve and other physical conditions of the Twelfth street line, &c.; and while there had access to the plans and profiles of the road in the office of defendant's engineers (Finding of Fact No. 9, printed record, page 221); that the plaintiff then proceeded with the construction of the cars; that defendant gave no direction in relation to the brakes on the cars other than that they should be extra heavy and extra powerful; nor were any plans or specifications of brakes furnished by plaintiff to defendant during the construction of the cars, but a brake was put upon them which was designed and constructed by

Mr. Twyman, plaintiff's engineer, the same person who came to Kansas City as above stated to ascertain the curves and other physical conditions of the Twelfth street line. (Finding of Fact No. 10, page 221, printed record.)

These findings of fact conclusively show that the plaintiff manufactured the cars in question for use upon the defendant's Twelfth street cable line, with full knowledge of its heavy grades and sharp curves and other physical conditions, and of the necessity of building the cars with a brake power sufficient in its design and construction to insure the proper handling of the cars upon such heavy grades and sharp curves.

These findings also show that in the specifications attached to the original contract the "brake power" was left blank, and that no specifications or designs for the brakes were ever furnished during the construction of the cars, but that plaintiff's engineer introduced his own new invention as the proper brake power. What more can be required to show that the defendant relied upon the skill and experience of plaintiff as to the brake power, and that the plaintiff is brought within the rule above stated, and impliedly warranted that the cars should be reasonably fitted for use upon defendant's Twelfth street line, and with a proper and sufficient brake power?

III.

The provision in the contract calling for an inspection and acceptance of the cars at the works of the plaintiff does not apply to defects discoverable only by actual use.

First. It is the only just and reasonable construction that can be given to the contract:

It must be remembered that the specifications left the question of "*brake power*" blank; that defendant relied upon plaintiff entirely in this regard; that plaintiff adopted for the brake power a *new invention* of one of its officers, which proved wholly insufficient for the purposes for which it was supplied. It must be further remembered that the sufficiency of these appliances could only be determined by a trial upon the particular line upon which the cars were to be used, or upon a similar one. (Finding of fact No. 16, page 226 printed record.)

Of course, there were many things about the cars as to which defendant did not rely upon plaintiff, but as to which an inspection would determine whether the specifications had been complied with. Thus, the length and width of the car were provided for. An inspection would determine whether the specifications had been complied with in such respect. So as to the number of the windows, the kind of material to be used, the finish of the different parts of the car, etc. As to such matters it is fair to presume that the intention of the parties was that, as an inspection would determine their correspondence with the specifications, the parties desired it made at the shops, so if there was a non-compliance it could be there determined and a remedy at once applied. But, as to defects not discoverable till use on the track, it cannot be presumed that the parties intended that the inspection should be final *when no facilities for such test were afforded.* (Finding of fact No. 11, pages 221, 222 printed record.)

It is a familiar principle that the law will not require vain things to be done; so, unless absolutely necessary, the Court will not place such a construction on the contract. We insist that the contract will bear the construction for which we contend; *i. e.*, that as to discoverable defects the inspection was to be final—as to matters left entirely to the judgment of plaintiff, when actual use alone would determine their sufficiency, it was not intended that the inspection was to be

final. Any other rule would operate unjustly and fraudulently; for as to the matters left entirely to plaintiff, the inherent qualities of which were known to it alone, it could conceal the defects and defendant be left remediless.

The true rule of construction is thus laid down in Noonan vs. Bradley, 9 Wal., 394–405:

"When an instrument is susceptible of two constructions, the one working injustice, and the other consistent with the right of the case, *that one should be favored which standeth with the right.*"

And in 2 Wharton on Contracts, Sec. 654, it is said:

"If a contract is open to two probable constructions, one of which would impute fraud or illegal purpose to one of the parties, while the other construction would be free from such taint, the latter construction will be adopted."

And at Sec. 672 it is said:

"In other words, the construction in all cases of doubt should be such as to dispense remedial justice."

It will not do to say that nothing asked for by the inspector was denied, because the parties did not contemplate a trial upon grades and curves such as existed on the Twelfth street line; no provision was made therefor, and under the circumstances it would work an injustice to permit plaintiff, having left to it the entire question as to "brake power," to foist its own new invention upon defendant, and to say, although its sufficiency could only be determined by use, that an inspection under circumstances which could not determine such sufficiency was intended to be final. This would be a construction "working injustice."

The construction contended for is not unreasonable. Thus, in cases of express warranties, general in their nature, the law is that they will be construed as not extending to

patent defects which are apparent upon careless inspection, or to defects which are at the time known to the buyer. (Story on Sales (4th Ed.), Sec. 354.)

In determining the true construction let us take some of the rules laid down by Dr. Lieber in his Hermeneutics, 136 7, cited in note 1 to 2nd Wharton on Contracts, Sec. 641, as applicable to contracts:

"5. No text imposing obligations is understood to demand impossible things."

A construction of this contract making an inspection conclusive as to matters, the sufficiency of which could not be determined without use, would impose an obligation on defendant demanding an impossible thing, to-wit: a discovery of existing defects under circumstances when it was impossible to discover them.

"6. Privileges, or favors, are to be construed so as to be least injurious to the non-privileged or unfavored."

The privilege, or favor, was extended to plaintiff in having the inspection at its shop. To construe the provision as applying to non-discoverable defects, would be the most injurious to the non-privileged—the defendant.

"7. The more the text partakes of the nature of a compact, or solemn agreement, the closer ought to be its construction."

Plaintiff invokes the provision as a solemn agreement dispensing with an implied warranty that otherwise would exist. The *closer*, therefore, ought to be its construction.

"8. A text imposing a performance expresses the minimum, if the performance is a sacrifice to the performer; the maximum, if it involves a sacrifice or sufferance on the side of the other party."

This provision imposes the performance of inspection—a

sacrifice to defendant if it defeats the warranty—a sacrifice in any event, as it requires the sending of an officer a long distance. It must, therefore, be construed as expressing the minimum; that is, an inspection only of apparent things.

"10. The effects which would result from one or the other construction may guide us in deciding which construction we ought to adopt."

The effect of plaintiff's construction (if counsel are right in their view of the law) would be, by implication, the destruction of the well settled principles of law as to implied warranty. It would cut out defendant from a remedy for defects necessarily known to the manufacturer, and not discoverable by the purchaser.

"12. Yet nothing contributes more to the substantial protection of individual liberty than a habitually close interpretation and construction."

Second. It is the construction given to the contract by the parties themselves.

The law unquestionably is that, if there is the slightest ambiguity as to the meaning of a contract, the construction which has been placed upon it by the parties is conclusive.

Chicago vs. Sheldon, 9 Wallace, 50–54.
Foster vs. Goldschmidt, 21 Fed. Rep. 70.
Wald's Pollock on Contracts, 403.
2 Wharton on Contracts, 653.

In Wald's Pollock on Contracts, 403, it is said:

"It must be remembered, however, that where both parties have acted on a particular construction of an ambiguous document, that construction, if in itself admissible, will be adopted by the Court. To this extent its original effect, though it cannot be *altered*, may be *explained* by the conduct of the parties. And moreover, if both parties to a contract

act on a common mistake as to the construction of it, this may amount to a variation of the contract by mutual consent. This is in truth another illustration of the leading principle. Here their conduct in performing the contract with variations would show an intention to vary it if the true construction were present to their minds."

In Chicago vs. Sheldon, 9 Wallace, 50-54, Mr. Justice Nelson said:

"In cases where the language used by the parties to the contract is indefinite or ambiguous, and, hence, of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference had become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But, in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the Court as the true one."

"Tell me," says Lord Chancellor Sugden, "what you have done under a deed and I will tell you what the deed means." [Attorney General vs. Drummond, 1 Dr. & W. 353, 366; affirmed on appeal, Drummond vs. Attorney General, 2 H. of L. Cases, 837; cited in 2nd Wharton on Con. 653.]

Let the Court propound this question and let us answer:

Court's Question: "Tell me what you have done under this contract:"

Answer: "Our inspector went to plaintiff's shop when requested, on December 30, 1887. Ten or twelve of the twenty-five cars were then shown as completed; so far were even these ten or twelve from completion that the first five were not ready for shipment till February 24, 1888. As to outward appearances the cars were sufficient—as to the particu-

lars designated by the specifications the contract seemed complied with. The plaintiff was implicitly relied on as to brake power. It placed a new style of brake on the cars—the invention of one of its officers—the sufficiency of which nothing but actual use on the particular line for which the cars were made would demonstrate. At the time of the inspection the cars were not even on rails. No place with grades or curves was provided. Neither party contemplated a test in any such manner. When the first lot of cars were shipped an officer of the plaintiff wrote that he hoped defendant would find the cars satisfactory. On the first trial, and before all the cars had been shipped, these brakes—*the new invention of plaintiff's officer*—were found insufficient, and plaintiff was immediately notified thereof, the defendant asking: "What remedy do you propose?" To this, plaintiff sent in person its engineer, the designer of the brake, who stated that he would remain until the brakes were made satisfactory. He attempted to remedy the trouble, and claimed that he had done so, and returned to his home. A second trial was had, and the defect was found to still exist. Defendant immediately notified plaintiff of the situation, asking it to remedy the defect or permit defendant to do it at plaintiff's expense. Plaintiff refused to permit defendant to act, writing: "You may rest assured that the defects will be remedied without expense to your company." It again sent its engineer, who, after working awhile, sent an assistant with typewritten instructions, saying that he should remain until the brake was made satisfactory. He went over the cars and pronounced them ready for service, and then left stating that if what he did failed to remedy the defects, they were remediless."

Now, having told you what the parties did under the contract, as Lord Chancellor Sugden says, the Court should now tell us what that contract means. And is it too much to say that it means, that, as to the discoverable particulars, about which defendant used its judgment and did not rely

upon the manufacturer, the inspection was to be final, but as to those matters left entirely to the maker, and of which actual use was necessary to determine their sufficiency, the inspection was not to be final and conclusive?

If we are right as to the construction of the provision in the contract as to the inspection, then it follows that the provision does not, as contended by plaintiff, operate to prevent the finding that there was an implied warranty.

IV.

Even if we are wrong as to the construction of the contract, yet the fact that the contract provided for an inspection does not exclude the implied warranty if the defect was not discoverable except by use on the Twelfth Street line.

The only case cited by plaintiff in the Court below, tending to establish the proposition contended for that a provision as to inspection excludes the idea of an implied warranty, is *Monitor Milk Pan Co. vs. Remington*, 11 *Hun.* (*N. Y.*) 218. That was by a divided inferior Court consisting of three judges, and a close examination of the case shows that the defect was in fact discoverable, as in the opinion of Hayden, P. J., it is said:

"It is manifest from the evidence taken upon the trial that the inspector by the use of lactic acid could readily have determined the character and quality of the enamel at the time he inspected the manufactured articles. It is inferable that had he made the proper tests and examinations and carried his inspection to the extent that the spirit of the contract warranted he would have discovered the existence of the defects that are complained of in respect to the enamel. Upon a discovery of that defect and a rejection, the process of manufacturing in that regard would have been arrested or the defect remedied."

And again on page 226 it is said:

"The referee found, as a matter of fact, that the quality and fitness of the enamel was ascertainable by applying lactic acid. It was the neglect of the plaintiff that that test was not made."

Churchill, J., was the only judge of opinion that the defect being a latent one made no difference. The third judge, Fallett, took the view we advanced in this case, saying:

"A manufacturer under an agreement to manufacture in a good and workmanlike manner, articles designed for a specific purpose remains liable for latent defects arising from unskillful workmanship, notwithstanding the vendee's acceptance of the article after inspection or trial, under a clause in the contract of sale giving the vendee the right to inspect or try. (Bird vs. Smith, 12 Q. B. 786; Heilbutt vs. Hickson Law R. 7 C. P. 438; 2 Benj. Sales (Corbin's Ed.) Sec. 911, page 792, and cases cited.) The effect of this clause was to pass the title of the accepted coolers to the plaintiff and the defendants became entitled to the purchase price subject to their continuing liability on their agreement to manufacture in a skillful manner. It will be observed that the contract does not contain an arbitration clause or clause of that nature, nor does it provide that acceptance after inspection shall discharge the defendant's agreement to manufacture in a good workmanlike manner." "Several cases have been cited as bearing upon this question. Wyckoff vs. Meyers, 44 N. Y. 143, arose over a building contract which contained an arbitration clause naming arbitrators, and it was held that the certificate of the arbitrators was binding on the parties. Glacius vs. Black, 50 N. Y. 145, also arose over a building contract which provided that the materials to be furnished shall be of the best quality and the workmanship performed in the best manner, subject to the acceptance or rejection of Edward Wall, architect, and all to be in strict accordance with the plans and specifications which are signed by the parties of the second part, and form part of this contract. The builders procured the certificate of the architect

and sued for the contract-price, and it was held that the defendant might recoup his damages arising from a failure to do the work in a workmanlike manner. This case was distinguished from Wycoff vs. Meyers, because of the absence of an arbitration clause. Bird vs. Smith, *supra*, was cited with approval. McParlin vs. Boynton [8 Hun. 449], arose over a contract to manufacture and deliver saws of a stipulated quality, subject to the inspection of the vendee. The saws were inspected and accepted, but were subsequently found not to be of the quality warranted. In an action for the price it was held that the defendants could not recoup their damages upon the ground that the defects were of a character that might have been discovered by inspection. None of the cases above cited are referred to in the opinion. This judgment was affirmed [71 N. Y. 604] without an opinion, three of the judges dissenting. Bigler vs. Mayor [9 Hun. 253], arose over a contract to furnish lumber and timber of a specified quality and size, subject to the inspection of the superintendent of repairs and supplies of the department of docks. The plaintiff held the certificate of the superintendent and upon the trial of an action for the purchase price the Court held the certificate conclusive upon the defendant unless the jury found that it was fraudulently given, or obtained. This was held to be error and a new trial was granted, the Court holding that the certificate was not conclusive as the contract did not so provide. In this case Bird vs. Smith, *supra*, and Glacius vs. Black, *supra*, were commented upon and approved, and Wyckoff vs. Meyers, *supra*, was distinguished, but McParlin vs. Boynton, *supra*, decided by the same Court at the preceding term, was not cited. The construction given to the clause under consideration seems to accord in principle with the rule declared in Briggs vs. Hilton *supra*, as it is difficult to see why a liability survives the acceptance and use of defective articles with an ample opportunity to inspect, under an executory agreement to deliver articles of a prescribed excellence, and not survive inspection, and acceptance under a like agreement containing a clause simply giving the right to inspect, which right the vendee has without the clause. [Pope vs. Allis, 115 U. S. 363.]"

We quote this opinion somewhat at length because it distinguishes many of the cases which will probably be cited by plaintiff's counsel in their brief in this case.

In Heilbutt vs. Hickson, L. R. 7 C. P. 438, the facts were as follows: The plaintiffs, merchants in London, on 30th of December, 1870, contracted in behalf of correspondents at Lille, in France, with the defendants, *manufacturers* of shoes, for the purchase of thirty thousand pairs of black army shoes, *as per sample*, at four shillings and eight pence per pair, less two and one-half per cent. discount, to be delivered free at a wharf in weekly quantities, *to be inspected and quality approved before shipment*, payment in *cash on each delivery*. Both parties knew that the shoes were required for the French army for a winter campaign. A sample shoe was deposited. The plaintiffs appointed a skilled person to inspect the shoes on their behalf. A number were rejected, but a large number were inspected and approved. On the inspection the soles were not opened, and it is not usual to open them, but without opening it could not be known of what substance the fillings of the soles had been made. Before the first delivery it had been publicly reported that a contractor in France had been in prison for using paper as fillings for the soles, and the plaintiffs' agent at the wharf asked that a shoe might be cut open to see if there was any paper in the sole. The defendants' foreman assented, saying that the plaintiffs might cut open as many as they pleased and would not find paper in any of them. One shoe was accordingly cut open and no paper was found in it. The plaintiffs' evidence also went to show that many assurances had been given to them by the defendants that there was no paper in the soles of the shoes. The plaintiffs accordingly accepted and paid for four thousand nine hundred and fifty pairs, which were shipped to destination at Lille, where they arrived on the 10th of February. Meanwhile it had been ascertained at Lille by one of the parties for whom the contract was made, that some of the shoes, including even the sample shoe, contained paper in the soles, and after some discussion the defendants on February 13 signed a letter dated February

11th, whereby they agreed to take back those shoes which might be thrown on plaintiffs' hands in consequence of paper being found in them, it being understood that they would not take back any large number of shoes if paper should be found in only a few pairs, and stating their willingness that the closest inspection should be made. Thereupon the inspection and delivery of the shoes were continued, paid for by the plaintiffs and by them forwarded to Lille. The total amount so paid for and forwarded was 12,225 pairs. From subsequent examination of a number of the shoes it appeared that a large proportion, in one instance seventeen out of eighteen pairs examined, and in another instance more than half of one hundred pairs taken from different cases, were found to contain paper, canvas, shavings or asphalt roofing-felt in the soles, and other similar examinations showed the same result. The French authorities accordingly on February 28th rejected the entire lot, of which the defendants were duly informed, and one of them at once went to Lille and endeavored to get the French authorities to accept the shoes, but unsuccessfully. The plaintiffs thereupon notified the defendants that they rejected the shoes delivered and refused to pay for more, and brought an action against defendants for breach of contract, claiming the right to throw the shoes already delivered upon the defendants' hands, and claiming the right to recover, among other things, the amount of the price paid for the shoes. The jury found that the shoes delivered and those ready for delivery *were not equal to sample* and that the defects *could not have been discovered by any inspection which ought reasonably to have been made*. The Appellate Court sustained the claim of the plaintiffs, two of the justices however, the Chief Justice Bovill and Justice Byles, holding that the plaintiffs had the right to return the shoes already delivered and paid for, and recover the price only by reason of the letter of February 11th, and not under the original contract alone; but that plaintiffs could recover under the original contract alone the damages they had sustained by reason of the *breach of the warranty*, and would not be precluded by their *inspection* and *acceptance* of the goods from such a recovery. In other words, that the implied warranty as to fitness and quality existed, notwithstanding the inspection provided for in the contract, and the

acceptance and payment of the price. The other Justice, Brett, held that under the original contract, and without the letter of February 11th, the plaintiffs had the right to return the shoes inspected, accepted and paid for, and recover back the price.

Bovill, C. J., said:

"It was contended for the defendants that as the sample shoe contained paper and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect the damages and especially the loss of profits did not result from the breach of warranty in the shoes not being equal to the sample. But the fact of the improper fillings in the sole of the sample shoe *was a hidden defect* and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes, and the letter of the 11th of February was directed expressly to the point of paper being in the shoes, and in our opinion gave the right to reject the shoes on that ground, and entitles the plaintiffs to recover the loss of profit which would have accrued if the shoes had been accepted by the French authorities." * * *

"If the case had rested on the original contract, we should have thought, as to the 12,225 pairs of shoes sent to France, that by the appropriation of these shoes by the defendants for the plaintiffs, the inspection and examination of them by the plaintiffs' agents, their being passed by those agents, the making out of invoices of the shoes so passed, debiting the plaintiffs for them as bought by the plaintiffs from the defendants, the delivery of them at the wharf, and the defendants having no further control over them, the plaintiffs' paying the defendants the amount of the invoices and subsequently sending the goods as their own to France and causing the freight and duty to be paid on them, and tendering them to the French authorities under the contract of M. Potel, they must be taken to have accepted those shoes, that the property in them vested in the plaintiffs, and that they were not at liberty to reject the shoes and throw them back upon the defendants' hands; see in addition to the cases cited and those above referred to Rhode v. Thwaites (3) and Parker

v. Palmer. (4) The same rule would also in our opinion have applied to the small quantity of shoes which were approved, passed and delivered and paid for and received at Fenning's wharf.

In this view of the case the shoes delivered would have remained the property of the plaintiffs and at their risk, *though they still would have been entitled to claim damages by reason of the breach of warranty and not be precluded by their acceptance of the goods, or the vesting of the property in them, from maintaining this action.* The damages however in that case would not have included the whole price paid for the shoes, but only the difference between the value of those which were delivered and what would have been their value if they had been supplied according to the contract, with such other amounts as the plaintiffs could legally establish."

Brett, J., said:

"Beside the incidents attaching to a contract of sale by sample which have been enumerated by my lord, I think there is also the following: That such contract *always contains an implied term that the goods may, under certain circumstances, be returned;* that such term necessarily contains certain varying or alternative applications, and amongst them the following: *That if the time of inspection as agreed on be subsequent to the time agreed for the delivery of the goods, or if the place of inspection as agreed upon be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to the sample, return them then and there* on the hands of the seller. * * The defect in the shoes was the consequence of acts of the defendant's servants, the defendants being the manufacturers of the goods, and the defect, though known to the defendants' servants, was a secret defect, not discoverable by any reasonable exercise of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London—an inefficacy caused by this kind of fault, viz., a secret defect of manufacture, which the defendants' servants committed—the apparent inspection in London could be of no more practical effect than no inspection at all. If

it could be of no practical effect, there could not be any effective, and therefore any real practical inspection until an inspection at Lille. * * * The *apparent* inspection in London being then *by the act of the defendants' servants*, no inspection at all, and consequently a *real inspection* at Lille being by the act of the defendants' servants the first possible effective inspection, it seems to me that such inspection was by the acts of persons for whose acts the defendants are responsible substituted for the first inspection stipulated by the contract, and that the rights of the plaintiffs accrued upon that inspection as if it were the first, and therefore they were entitled to throw the shoes upon the hands of the defendants *at Lille.*"

This case is referred to at length in 2 Benj. on Sales, (Corbin's Ed.) Secs. 975, 976, and the learned author adds:

"*Semble*, therefore, that if a *manufacturer* agrees to furnish goods according to sample, the sample is *to be considered as if free from any secret defect of manufacture.*"

Yet that sample was, necessarily, inspected when the order was given. Bird vs. Smith, 12 Q. B. 786, sustains the principle contended for.

In Blackburn on Sales [2d Ed.] 210 the case of Josling vs. Kingsford, 13 C. B. (N. S.) 447; 32 L. J. C. P. 94, is cited to the effect that even when there is a purchase by inspection, there is no release of the condition that the goods shall be of the kind ordered, if that fact could not be detected by mere inspection.

In 2 Benjamin on Sales, (Corbin's Ed.) Secs. 985, 986, 987, 988 and 989, the learned writer undertakes to state the true rules as to an implied warranty. He states first (Sec. 985) that when the seller is *neither a grower or manufacturer*, an opportunity to inspect brings into force the rule of *caveat emptor*, and then there is added in the notes this language:

"Where the defect is one not discoverable by inspection

the same rule applies, subject to the exceptions named in the text as to cases of fraud, or where the seller is the manufacturer or grower, and therefore his supposed care and skill constitute a part of what is contracted for."

At Sections 988 and 989 the learned author says:

"SEC. 988. Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. [Brown vs. Eddington, 2 M. and G. 279; Jones vs. Bright, 5 Bing. 533.] In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

"Sec. 989. Where a manufacturer undertakes to supply goods manufactured by himself or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. [Laing vs. Fidgeon, 4 Camp. 169; 6 Taunt. 108.] And this doctrine has been held to apply to the sale by the builder of an existing barge which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. [Shepherd vs. Pybus, 3 M. and G. 868."]

At Section 994, speaking of the implied warranty by a manufacturer, the same author says:

"The warranty extends to latent defects unknown to and even undiscoverable by the vendor which render the articles sold unfit for the purpose intended."

And at Section 995 it is said:

"In Shepherd vs. Pybus, where the sale was of a barge by the *builder, although the purchaser had inspected it after it was built,* yet, as he had no opportunity of inspecting it during its progress, it was held that there was an implied warranty by the vendor as the manufacturer, against such defects *not apparent by inspection* as rendered the barge unfit for use as an ordinary barge."

The case referred to is Shepherd vs. Pybus, 3 M. & G. 868.

In Story on Sales (4th Ed.) Section 369, it is said:

"But where the whole of the goods are completely opened to the examination of the buyer and are examined by him, *and the seller is not a manufacturer*, and does not know of the purpose to which they are intended to be applied and makes no warranty or representation of fitness, he is not understood to assume a responsibility for any defect in the goods whether it be latent or patent; for the law will not protect a purchaser from the consequences of his own folly and carelessness where he has solely trusted to his own judgment, if the other party has not undertaken to supply an article of a particular quality or nature and has done nothing to mislead him." * * * But if he cannot examine them, as if he order them from a distance, *or if they be so placed as to render an examination impracticable, he must of course trust to the seller;* and the seller by undertaking to comply with his order, or by furnishing him with goods in answer to his demand virtually affirms them to be such as have been ordered or demanded. And as he occasions the injury he ought fairly to incur the loss."

And at Section 375 it is said:

"The second class of cases in which a warranty is implied against *latent defects*, is where from the situation of the parties the seller might have provided against the existence of any such defects, or where a warranty against them is implied in the very nature of the transactions, as in the case of

a manufacturer or producer who undertakes to furnish articles of his manufacture or produce in answer to an order. The ground of this warranty is the implied trust and confidence necessarily reposed in such cases in the vendor by the vendee with the tacit consent of the former."

In Craver vs. Hornburg, 26 Kansas, 94-95, Judge Brewer stated the rule as we claim it, thus:

"We think that when an article is ordered from a manufacturer, for a specific and understood purpose, the purchaser may, after giving the article a fair trial and finding it unfit for the intended use, return it within a reasonable time to the manufacturer. An express agreement, such as was in this case, that the machine should be made of good material and well made, and should work well with proper management, does not deprive the purchaser of the right to return the machine if it will not do the intended work. Doubtless, if the unfitness was apparent on the face, the right to return would be lost; *but if the unfitness could only be determined by actual use, then until such use was had or a reasonable time therefor had elapsed, the purchaser was not absolutely bound.* The mere receipt of the article is not, under those circumstances, such an acceptance of the contract as precludes the purchaser from further question."

This Court, in Kellogg Bridge Co. vs. Hamilton, 110 U. S. 108, 117, after giving full force to the doctrine of *caveat emptor*, stated the rule as between the buyer and the manufacturer thus:

"When, therefore, the *buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture.* If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was de-

signed, the seller at the time being informed of the purpose to devote it to that use."

That case so thoroughly discusses this question that it seems to us there can be no answer to the proposition now urged. There the bridge was in plain sight—the subject of inspection—but the Court applied the rule as shown by the extract quoted. Manifestly there can be no difference between the case where the contract provides for inspection and the case where inspection actually takes place before the purchase.

In Boothby vs. Scales, 27 Wis. 626, 633, there was an actual inspection. The Court, discussing the question, said:

"The buyer of a manufactured article, like a fanning mill or other similar machine, having no previous skill or experience, cannot ascertain from mere inspection whether it will operate well or not, or whether it is reasonably suited to the purpose for which it was made and to which he intends to apply it. Nothing short of an actual trial or experiment will determine those questions. As well might an unskilled person be required to ascertain and take notice at his peril whether a watch will keep time by looking at its cases or machinery and the parts of which it is composed, when in treaty with the manufacturer for it, and when the manufacturer knows it is wanted to keep time, and sells it for that purpose, and receives a fair price for a good article. *It would be a strange doctrine to apply to such a case, if the watch turned out, upon trial, to be worthless, that the purchaser's eyes were his guide and he, himself, the judge from mere inspection, and that the manufacturer could retain the price, giving nothing for it in return. Such is not the law and clearly never ought to be.* The defendant here had the right of actual experiment with the fanning mill after he took it into his possession, in order to ascertain its working qualities and was not precluded from relying upon the implied warranty because he saw the mill at the time of purchase. Where one sold as hemp, a number of stacks, which, upon examination after the sale, were found so largely com-

posed of weeds that their distinctive character as hemp was lost, and such a fact was unknown to the vendee, *and could not have been discovered by ordinary inspection :*

"*Held:* That the vendor cannot recover any portion of the purchase money by reason of non-performance on his part." [Foggs, Administrator, vs. Rogers, 84 Ky. 558 s. c., 2 S. W. Rep. 248.]

This question was considered in a case where an inspection was had. Parks vs. O'Connor, 70 Tex., 377 s. c., 8 S. W. Rep. 104 and 108. The Court said :

" If there be no warranty and the article tendered be not such as is described in the contract and this be known to the purchaser he must either refuse it and rescind the contract, or accept it and abide by the agreement. If, however, the property be not such as is described and *the defect be such as cannot be discovered by the exercise of reasonable care* and the buyer does not discover it until he has made such disposition of the property that he cannot return it to the seller, then he may recover his damages by reason of the seller's failure to comply with the terms of his contract."

Hudson vs. Ross, 72 Mich., 363 s. c. 40 N. W. Rep. 467, was a case where a mirror was ordered, inspected and accepted; aftewards latent defects were discovered. It was held that there was a breach of the implied warranty. The Court said :

" Under the law, as found by the Court, the defendant was not entitled to reject the mirror because she accepted it in the first place *when the defects were not apparent :* this is not the law. The defects were latent but when discovered the defendant was not bound to keep the mirror."

In Gould vs. Stein, 149 Mass. 570 ; s. c. 22 N. E. Rep. 47–49, it was held that upon the facts there was an implied warranty, and the fact that there was actual inspection did not exclude the warranty. As to the latter question,

the Court cited some cases which have not been before us, and said:

"The fact that the plaintiffs had an opportunity to examine the rubber, and actually made such examination as they wished, will not necessarily do away with the effect of the warranty. The plaintiffs were not bound to exercise their skill, having a warranty. They might well rely on the description of the rubber, if they were content to accept rubber which should conform to that description. [Henshaw vs. Robbins, 9 Metc. 83; Jones vs. Just, L. R. 3 Q. B. 197.] And the exhibition of a sample is of no greater effect than the giving of an opportunity to inspect the goods in bulk. Notwithstanding the sample or the inspection, it is an implied term of the contract that the goods shall reasonably answer the description given, in its commercial sense. [Drummond vs. Van Ingen, L. R. 12 App. Cas. 284; Mody vs. Gregson, L. R. 4 Exch. 49; Nichol vs. Godts, 10 Exch. 191.] In the two former of these cases it was held that there might be, and that under the circumstances then existing there was, an implied warranty of merchantable quality, *notwithstanding the sale was by a sample, which sample was itself not of merchantable quality, the defect not being discoverable upon a reasonable examination of the sample.*"

That the defects in the brakes were not discoverable except by use was manifest from the undisputed evidence in the case, and the Court below so found. (Finding of fact, No. 216, page 226 printed record.)

V.

The fact that the work was done under specifications does not exclude the idea of an implied warranty.

It was argued below with some ingenuity that, as there were certain specifications, the implied warranty is excluded. It must be taken as settled law, that when the buyer does not

rely upon the judgment of the manufacturer, there is no implied warranty. In other words, the whole doctrine of implied warranty by the manufacturer rests upon this foundation: That the buyer in some respect relies upon the judgment and skill of the manufacturer, and the latter has a special knowledge of the entire work from its inception, and therefore it would be a constructive fraud to permit inferior work to be foisted upon the buyer.

As to the style and finish of the cars, the rule contended for might be invoked. If, for instance, a combination car could not be operated on the Twelfth street line, it might be well said that there was no implied warranty, because defendants ordered that particular car, and did not trust to the judgment of the manufacturer in that respect. So if a car of the width designated by defendant could not be operated on this line, not having trusted in that respect to the skill of the manufacturer, there would be no implied warranty. But we need go no further with illustrations. The question "brake power" was left entirely to the manufacturer. The specifications left the matter without direction. Defendant trusted entirely to the manufacturer. The plaintiff exercised its judgment in selecting the invention of its officer, and all the reasons exist for finding that there was an implied warranty that these cars so far as brake power was concerned should be reasonably fit for use.

VI.

For a breach of the implied warranty the defendant, within a reasonable time, could elect to rescind the contract.

While some cases are to the effect that a warranty is a collateral contract, and a breach thereof only gives an action

for damages, the better rule seems to be that there can be a rescission. This is the law of Illinois and Missouri, where this contract was made, and should be the rule to govern these parties, as they are presumed to have contracted in reference to it. (See authorities cited under Point VII, *supra.*)

Mr. Justice Brewer had occasion to consider this question in two cases while on the bench of the Supreme Court of Kansas. In Craver vs. Hornburg, 26 Kansas, 94, 95, he said:

"We think that when an article is ordered from a manufacturer for a specific and understood purpose, the purchaser may, after giving the article a fair trial, and finding it unfit for the intended use, return it within a reasonable time to the manufacturer."

In Weyrich vs. Harris, 31 Kansas, 92, he said:

"It is a general proposition that on a sale of a personal chattel, with a warranty, in case the chattel turns out to be not of the kind or quality represented, the purchaser may have one of two remedies: He may rescind the contract and return the property. The effect of such action is to place the parties in the same condition in which they were before the purchase, and whatever has been paid or delivered by either is to be returned, and it or its value may be recovered in an action therefor. This is one remedy. The other is: That the purchaser may affirm the contract, retain the property, and recover damages from the vendor for the breach of his warranty."

Judge Philips has announced the same rule in Branson vs. Turner, 77 Mo., 489, where he said, at pp. 493, 494:

"If the cattle on trial and further investigation proved to be otherwise than as warranted the vendee had two remedies. He could have returned the property to the vendor, provided he acted seasonably, and rescinded the contract; or

he could have retained the same, and when sued for the purchase money pleaded a total or partial failure of consideration."

Whatever may be the English and New York rule the law upon this subject as sustained by the great weight of authorities is as set forth in the foregoing extracts from the opinions of Judges Brewer and Philips.

In Dow vs. Fisher, 1 Cush., 274, it was said by Shaw, C. J., that,

"To avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to the complete restoration of the property to the vendor; and without this he cannot recover."

And in Bryant vs. Isburgh, 13 Gray, 607, Metcalf, J., said:

"But we are of opinion (notwithstanding a *dictum* of Parsons, C. J., in Kimball vs. Cunningham, 4, Mass. 505) that, by the law of this commonwealth, as understood and practiced upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter, which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty by a seasonable return of the property, and thus entitle himself to a full defense to a suit brought against him for the price of the property, or to an action against the seller to recover back the price if it had been paid to him. In Bradford vs. Manley, 13 Mass., 139, where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold (and in which case there was no fraud), Chief Justice Parker said, 'If a different thing is

delivered, he (the seller), does not perform his contract and must pay the difference or receive the thing back and rescind the bargain, if it is offered him.'"

The result of the great weight of authorities is that if there is a warranty expressed or implied, there may be a rescission by the vendee.

This may be conceded to be contrary to the English rule which treats an *express* warranty as collateral upon which an action of damages may be sustained as the only remedy. As to *implied* warranty, however, the English rule permits rescission in case of breach, because it is said that an implied warranty is a condition of the sale and for a breach of such condition there can always be a rescission as will be shown in the next division of this argument.

VII.

The non-compliance with the condition of a contract will always authorize a rescission.

The result of this doctrine is that whenever there is a violation of a condition as to description, time of delivery or implied obligation, there may be a rescission. (See authorities cited under Point VIII, *supra.*)

The rule obtains even where a rescission is not permitted for a breach of warranty. But as said in Note 32 to Sec. 918 of 2nd Benjamin on Sales:

"The importance of distinguishing between a breach of conditions in the quality of the thing sold and a breach of warranty, consists in the remedy as explained in the text. In those States, therefore, where an avoidance is permitted for breach of warranty, the distinction loses its importance."

VIII.

When an article is ordered from a manufacturer upon an executory contract, there is the implied warranty before mentioned, and this is a condition of the contract which will authorize a rescission for a breach.

Whatever may be the rule as to rescinding for a breach of warranty, the doctrine denying the right to rescind comes from the English cases. The English doctrine, however, makes the implied contract of warranty a condition of the contract, and if violated, the right of rescission exists. (See authorities cited under Point IX, *supra.*)

The distinction as to an implied warranty by a manufacturer upon an executory contract is too refined to be clearly drawn.

Mr. Benjamin, agreeing that the implied obligation of a manufacturer is an obligation of the contract, at Sec. 1349, quotes from the author of Smith's Leading Cases as follows:

"A warranty, properly so called, can only exist where the subject matter of the sale is ascertained and existing, *so as to be capable of being inspected at the time of the contract*, and is a collateral engagement that the specific thing so sold possesses certain qualities, but the property passing by contract of sale, a breach of warranty cannot entitle the vendee to rescind the contract and revest the property in the vendor without his consent. * * * But where the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because *the existence of those qualities being part of the thing sold becomes essential to its identity*, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

In Voorhees vs. Earle, 2 Hill 288, Cowen, Judge, speaking of the rule laid down by Lord Tenterden, that there can be no rescission for a breach of warranty, says:

"Of course he distinguishes between a sale and an executory contract, in which latter case the goods may generally be returned as soon as they are found not to satisfy the contract, if the purchaser has done nothing in the meantime beyond what is necessary to give them a fair trial."

In Pope vs. Allis, 115 U. S., 363–371, this Court says:

"When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

IX.

The receipt of the cars does not prevent the return whether considered as a rescission on account of the breach of the warranty or a rejection on account of breach of a condition.

This proposition is sustained by the authorities. (Point X *supra*).

Especially is the right to rescind or reject not lost when the failure so to do comes from the assurances of the vendor.

Courtney vs. Bowles, 65 Mo. 196.
Day vs. Poole, 52 N. Y. 416.
Matthews vs. Fuller 8 Ill. Ap. 529.

Mr. Justice Brewer, when a member of the Kansas Supreme Court, in Craver vs. Hornburg, 26 Kansas, 94, said:

"Doubtless, if the unfitness was apparent on the face, and the purchaser nevertheless accepted the article, the right to return would be lost; but if the unfitness could only be determined by actual use, then until such use was had or a reasonable time therefor had elapsed, the purchaser was not absolutely bound. The mere receipt of the article is not, under those circumstances, such an acceptance of the contract as precludes the purchaser from further questions."

The language of Judge Swing, in Dawes vs. Peebles, 6 Fed. Rep. 856, 861, is applicable to this case because there defendant used the article while waiting for the vendor to take it away, while here the defendant used the cars while plaintiff was assuring it that the defects would be remedied, and was attempting to remedy them. Judge Swing, in that case, said:

"If the apparatus by reason of the defects was unfitted for the purposes designed for such apparatus, and the defendant, before the first of June, notified the plaintiffs that they would not accept it, and for them to take it down and remove it, and plaintiffs refused to do so, the fact that it remained in the position in which plaintiffs had set it up, and was for a short time used by them whilst waiting for them to take it down and remove it, would not make the defendants liable for the apparatus."

In Doane vs. Dunham, 69 Ill. 131, the rule was applied where the vendee bought a lot of sugar, but did not examine it for a long time, as it was not customary for merchants to examine such articles till opened for sale. It was held that the right to rescind for breach of warranty was not lost.

In Matthews vs. Fuller, 8 Ill. Ap. 529, goods were received on June 4, and there was no rescission till September, but in the mean time there had been correspondence between

the parties, and the Court held that there was no final intention to accept.

Curtis & Co. Mfg. Co. vs. Williams, 48 Ark. 325 s. c. 3 S. W. Rep. 517, is very much like this case in its facts. The goods were returned after a fair test.

In Branson vs. Turner, 77 Mo. 489, the purchaser kept and used the cattle purchased, for two weeks, yet it was held that he was still entitled to rescind.

In 2 Benjamin on Sales, Sec. 1350, it is said:

"In actual practice the only difficulty which arises in these cases grows out of controversies whether the buyer has actually accepted the goods and thus become owner. On this point the cases show that acceptance does not take place by mere retention of the goods for the time necessary to examine or test them, or by the consumption of so much as is necessary for such examination and testing; *and it is always a question of fact for the jury, whether the goods were kept longer or whether a larger quantity was consumed than was requisite to enable the buyer to decide whether he would accept or reject.*"

In Day v. Pool, 52 N. Y. 416, 421, the Court used language applicable to this case, in view of plaintiff's action in promising to remedy the defects. Peckham, Judge, said:

"Here notice was given of the defects in the syrup at an early stage, and the defendants promised to attend to it. They also apparently acquiesced in plaintiff's use of it, virtually promising to make it right if it did not prove to be sound rock candy syrup. It would scarcely be just now to allow the defendants to take advantage of the non-return of the syrup under such circumstances."

The same may be said of Courtney vs. Bowles, 65 Mo. 196, 201, where Judge Norton used this language:

"It was doubtless the desire of plaintiffs to retain and pay for such a machine as they believed they were buying, and it seems to have been the purpose of defendants to make the reaper and mower all they represented it; and to hold that

plaintiffs could not maintain an action for breach of warranty after the failure of defendants to comply with it, and recover what had been paid, while efforts were being made by defendants, and at their request, to make the machine answer the purpose for which it was bought, would be to extend the doctrine that voluntary payments of money could not be recovered back, beyond its true scope."

The most that can be said is that the buyer must not keep the goods an unreasonable length of time. What is a reasonable or unreasonable length of time is a question of fact to be determined from all the circumstances. 1 Parsons on Contracts, 592.

In Story on Sales, (4th Ed.) Sec. 426 it is said:

"The question here arises as to what is the duty of the vendee in order to rescind a contract in cases where he is privileged so to do. And in the first place he is ordinarily bound to return the goods within a reasonable time. What constitutes reasonable time, of course, depends upon the circumstances of each particular case and cannot be reduced to any precise rule, but sufficient time is always allowed to enable the vendee to make a fair trial of the article."

The facts which warrant the application of the rule of law here contended for fully appear in findings Nos. 20 and 21, page 227, printed record.

X.

A mere offer to return is a sufficient rescission.

This is clearly the law.

(See authorities cited under point XI.)

And the vendor will be put in statu quo if the chattel is returned injured, if not injured by the buyer's negligence.

2 Kent Sec. 480, Note (*c*) citing Head vs. Tattersall, 41 L. J. (N. S.) Ex. 4 L. R., 7 Ex. 7.
2 Schouler on Per. Property, 313.

The authorities cited fully sustain the proposition to which they are cited. Mr. Benjamin tersely states it when he says, at Sec. 1348:

"It is sufficient for him (the buyer) without returning the goods to give notice to the seller that he rejects them, and that they remain at the seller's risk."

And in Story on Sales (4th Ed.) Sec. 426, it is said:

"In all cases, however, where the buyer is entitled to rescind a contract of sale, an offer to return is considered as equivalent to a return, although it be not accepted by the vendor."

XI.

If this Court should be of the opinion that our construction of the inspection clause of the contract is erroneous, and that the inspection called for was intended to be conclusive as to latent defects, and such as were really only discoverable by trial and use upon the defendant's Twelfth street line or upon a similar line, then we will call the attention of the Court to the fact that a compliance with that part of the contract was waived by the acts of the parties.

The only notification by plaintiff to defendant to inspect was that given in December, 1887, in response to which defendant's superintendent went to Pullman and was there shown ten or twelve cars as completed. He inspected those ten or twelve cars, found nothing wrong with them, announced himself as satisfied with them, and requested the plaintiff to

finish the others in the same way and forward them without delay. Not until February, 24, 1888, were any of the cars shipped, and then only five. On March 1st eight more were shipped, and on March 17th two, making up to that time fifteen in all shipped out of the twenty-five, and of these fifteen but twelve at the most had been inspected. On March 22d, and before any more had been shipped, the first trial was had and they were found defective in the brake power and plaintiff duly notified at once. In response to this plaintiff's engineer, the inventor of the brake power, came to Kansas City and undertook to remedy this difficulty, and then left, claiming that he had done so. In the meantime the plaintiff, after the receipt of the notice from defendant of the trouble with the cars, and after plaintiff had sent its engineer to Kansas City to remedy the defect, shipped the balance of the cars—five on March 27th and five on March 30th—without asking for or having any inspection or acceptance at Pullman of the thirteen or fifteen cars not completed or ready at the time Mr. Lawless was there in December. A few days after the last shipment, and on or about April 7th or 10th, defendant's whole line was ready and the cars were for the first time placed upon the line. This was shortly after plaintiff's engineer had left Kansas City. The defects in the brake power still appeared, notwithstanding Mr. Twyman's previous efforts to remedy them, and the plaintiff was again promptly notified. To this notification the plaintiff replied by letter that their engineer would at once leave for Kansas City, and saying that the defendant might rest assured that the defects would be remedied without expense to it. The engineer, Twyman, came to Kansas City, did some work on the cars, but being called away by letter or telegram, left for Chicago, stating that he would soon return and complete the work. Instead of doing so he sent a letter to defendant, saying:

"I am sorry not to be able to return to Kansas City as

quickly as I anticipated. We have, however, arranged to send you a man immediately who will take charge of the necessary alterations on your cars. There will be no necessity of his leaving Kansas City *until everything is arranged to your satisfaction*, and I will probably come out there again towards the end of the week."

Immediately following this letter, plaintiff's mechanic, Overtoom, came with type written instructions from Twyman and went to work on the cars. He also was unsuccessful in remedying the defects. (Findings of Fact, Nos. 11, 12, 13, 14 and 15, pages 221 *et seq.*, printed record.)

These facts conclusively show that notwithstanding the inspection of ten or twelve cars at the works, as called for by the contract, plaintiff waived the right (if it had such right) to claim this inspection as final and conclusive, by its letters and actions when notified of the defects in the brake power. The plaintiff further waived its right to have an inspection at the works of the other thirteen or fifteen cars when completed, by not notifying the defendant and calling for such inspection, but shipping them to Kansas City, and that, too, after plaintiff had been notified of the defects and was endeavoring to remedy them.

The contract in this case, taken in connection with the subsequent acts and letters of the plaintiff, makes a more favorable case for sustaining the right of rescission of contract and return of property, than did the original contract, with the subsequent letter, in Heilbutt vs. Hickson, from which we have so liberally quoted in a former part of this brief.

That a waiver of a condition in a contract may be implied from certain acts, has been so often decided under varied circumstances in connection with insurance policies, and the rule is so familiar to the profession and courts as to scarcely require a citation of authorities. See

1 Wood on Fire Ins. (2d Ed.) 68–75, 207.
2 Wood on Fire Ins. (2d Ed.) 756, 757, 967–983, 1149–1161.

Viele vs. Ins. Co., 26 Iowa, 9.

It is competent to show by parol or otherwise that the performance of a condition in a contract has been waived and that the parties have so far dispensed with a performance of the condition as to change the contract in such respect.

Stephens' Digest, Law of Evidence, Chap. 12, p. 161, *et seq.*
Wharton on Evidence, Sec. 1017, and note to same, pp. 257–258–259.
Greenleaf on Evidence, Sec. 304.
Kennebec Co. vs. Auguste Ins. & Banking Co., 6 Gray (Mass.) 204, 207.
Canal Co. vs. Ray, 101 U. S. 522–525.
Brown vs. Erhart, 52 Wis. 205.
Burt vs. Saxton, 8 N. Y. (1st Hun.) 551.

The rule recognized by all these authorities, and many others, is thus stated by the Supreme Court of Massachusetts, in the case above cited from 6th Gray, at page 207:

"But it is now a perfectly well settled doctrine that a written contract may be materially varied and changed by subsequent agreements, orally entered into by the parties, at any time before there has been a breach of its stipulations."

And by this Court in Canal Co. vs. Ray, *supra*, as follows:

"There can be no doubt that a party to a contract imposing mutual obligations may accept, as performance by the opposite party, some other thing than that specifically designated, and if he does he cannot afterwards insist upon exact performance."

The elementary authorities above cited lay down the rule that it is competent, in a suit upon a written contract, to prove by parol, "the existence of any subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise."

In Williams vs. Bank of U. S., 2 Peters, 102, the doctrine is announced in these words:

"If a party to a contract who is entitled to the benefit of a condition upon the performance of which his responsibility is to cease, dispenses with, or by any act of his prevents the performance, the opposite party is excused from proving a strict compliance with the condition."

While this proposition was not seriously disputed, there was an intimation by counsel on the argument in the Court below (but no authority was cited) that this modification, dispensation or waiver, whatever it may be called, must rest upon a new consideration. The books do not say so, nor is there anywhere an intimation to be found to such effect.

In Wharton on Contracts, Sec. 499, it is said:

"What has been said applies to all cases of modification and reconstruction. In such cases the abandonment of the old agreement is a good consideration for the new agreement."

The foregoing has been written without having an opportunity of seeing any brief on the part of plaintiff in error.

Respectfully submitted.

WALLACE PRATT,
FRANK HAGERMAN,
For Defendant in Error.

We call especial attention to Philadelphia Whiting Co. V. Detroit White Lead Works 58 Mich. 29., where nearly every question herein presented is decided in favor of our contentions.

Office Supreme Court, U. S.
FILED.
JAN 8 1895
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 146.

PULLMAN'S PALACE CAR COMPANY,
Plaintiff in Error.

vs.

METROPOLITAN STREET RAILWAY COMPANY,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

WALLACE PRATT,
FRANK HAGERMAN,
Counsel for Defendant in Error.

TIERNAN-HAVENS PTG. CO., KANSAS CITY.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

Since writing and printing our brief in this case we have received a copy of the brief of the plaintiff in error, and, while a careful examination of it discloses nothing necessarily calling for any addition to our brief, we deem it due to the Court to review some of the many authorities cited by the plaintiff, and thus assist in showing, in many cases, their inapplicability to the points in support of which they are cited, and in others the evident misapprehension of the learned counsel of the questions considered and decided.

The first point in plaintiff's brief is that the contract between the parties "cannot be varied or added to by parol," and "no provision can be interpolated therein aside from what is expressly stipulated."

We infer that by this is meant that no evidence, outside of the contract itself, could properly be introduced for the purpose of showing

that the plaintiff knew the use to which defendant proposed to put the cars.

We can conclusively answer this by the statement that the findings of the Court (Nos. 5, 6, 7, 8 and 9) show that plaintiff did know that the cars were for use on defendant's Twelfth Street line, and also had a general knowledge of its grades and curves. Whether the Court below found this from the contract and the cotemporaneous writings alone, or whether there was some other evidence, parol or in writing, that showed it does not clearly appear in the findings, but in either event the testimony was introduced *without any objection on the part of the plaintiff, at least without any made to the judges who tried the case below.* (Page 200 Record—cited also on page 79 of plaintiff's brief.) Hence no objection to the admissibility of any evidence upon which the findings are based can be heard in this Court.

The fact, however, that the cars were for use upon the defendant's Twelfth Street line appeared distinctly in the letters and acceptance which constituted the contract between the parties.

The proposition (page 219 Record) bore date June 14, 1887, while the letter enclosing it to the defendant was dated June 21, 1887. (Page 218 Record.)

The acceptance of the proposition was made June 27, 1887, (page 219 Record) and the letter enclosing the acceptance bears the same date, and calls attention to the fact that the cars were intended for the Twelfth Street line. (Page 220 Record.) This was cotemporaneous with the acceptance, related to the same subject matter, and it is proper that it be read in connection with the proposition and acceptance for the purpose of showing that the plaintiff knew the use the defendant intended to make of the cars. *Lee v. Dick*, 10 Peters, 482.

Mr. Greenleaf says, in Section 283 of his work on evidence:

"It is, in the first place, to be observed that the rule does not restrict the Court to the perusal of a single instrument or paper; for, while the controversy is between the original parties, or their representatives, *all their contemporaneous writings*, relating to the same subject matter, are admissable in evidence."

The cases cited by plaintiff to this proposition of its brief are principally those where there was an *express warranty*, and an attempt was made to add an implied one, but the courts properly held that an express warranty of quality excluded any implied warranty.

This was precisely the point in question in *De Witt v. Berry*, 134 U. S. 306, cited by plaintiff on page 22 of its brief.

In *Sietz v. Brewers Refrigerating Co.*, 141 U. S., 516, the question was whether the law implied a warranty of fitness for intended use when the contract was for the manufacture of a known, described and

definite, article, and this court held, in accordance with all the authorities, that as the known, described and definite, article was furnished, there was no implication of warranty in such a case, except that the machine would perform the work the described machine was made to do, and there was no claim of failure in such performance.

So in the case at bar, if the plaintiff was the manufacturer of a well known cable car, designated and defined as "Pullman's No. 2 Combination Cable Car," and without any further specification as to form, design or component parts, of construction, the defendant had ordered 25 such cars, and the plaintiff had accepted the order, the plaintiff would comply with the contract if it furnished them like the known and designated No. 2 Pullman Combination Cable Car, although that kind of car was always equipped with the brake invented by the Chief Engineer of plaintiff, and it should subsequently prove useless upon defendant's line. The defendant would in that case be presumed to have known the character, kind and efficiency, of the brake that was used upon those so designated cars. If, however, those so designated cars had always been equipped with a certain kind of brake, and the plaintiff, upon receiving such an order as above suggested, had equipped the cars with another kind of brake, for instance one of its own invention, then the defendant could have refused the cars because they were not of the known, designated and described kind ordered.

The second, third and fourth points of plaintiff's brief (pages 24 to 60, inclusive), and to support which a number of authorities are cited, are based upon the inspection clause of the contract, the plaintiff claiming that this clause excluded the implied warranty of the manufacturer, and made the contract the same as one for the sale of *specific chattels*, where the rule of *caveat emptor* is applied.

This was the position taken by the plaintiff in the court below, and is equivalent to saying:

"Although the plaintiff knew that the cars were intended for use on the defendant's Twelfth Street line, and that this line was one of heavy grades and sharp curves; although the kind of brakes to be applied to the cars was left entirely to the skill and judgment of the plaintiff; and although the plaintiff applied as a brake a new invention of its chief engineer, worthless for the purpose, but the worthlessness of which could not be ascertained by inspection at the works, and only by use upon the defendant's line or a similar line, in consequence of the latent defects of design, construction and manufacture; yet,

because of the inspection by defendant and acceptance of a part of the cars at the works of the plaintiff, without a discovery of these latent defects in the brake, the defendant had no remedy whatever upon subsequently discovering the worthlessness of the brake after a reasonable trial upon its line, but was concluded by the inspection at plaintiff's works as to all defects, latent as well as patent."

This is the principal question in controversy in this case. To properly determine it, and at the same time show the inapplicability of most of the cases cited by counsel for plaintiff to support their contention, it is only necessary to briefly examine the grounds upon which the rule of *caveat emptor* is based, and also the reasons why it is not applied to sales of articles by those who have manufactured them.

Caveat emptor applies to all cases of sales of existing articles, in the absence of express warranty, where the purchaser has an opportunity for inspection, and the seller is guilty of no fraud, and *is neither the manufacturer nor grower of the article sold.* (*Barnard v. Kellogg*, 10 Wal., 383-388.)

The reason for the rule is that both seller and buyer stand upon an equal footing—one presumably having no knowledge or information of the quality of the article sold superior to the other. Should there be latent defects, not ascertainable by inspection, there is no presumption that the seller knew of them, because his information is derived from the same source as that of the purchaser, namely, an inspection of the article in its completed state. The purchaser does not, and has no right to, rely upon the judgment of the seller, but upon his own; hence is without remedy if the article purchased proves worthless in consequence of latent defects of manufacture or production.

Where the seller is the maker or the manufacturer of the article sold, the parties do not stand upon an equal footing. The seller knows, or is presumed to know, the process of the manufacture, and to be cognizant of latent defects in construction and workmanship, and the purchaser has the right to rely upon the judgment of the seller and not upon his own as to all defects in construction, not apparent and visible upon inspection and examination of the completed article; and when the contract of sale is an executory one to manufacture an article intended for a particular use, of which use the seller at the time has notice, and the whole or any part of the design, form or component parts, of the article is left to the skill or judgment of the manufacturer, then the parties are also upon an unequal footing. The manufacturer knows or is presumed to know whether the whole, or such part of the design, form or component part, of the article as is left to his skill or judgment will be reasonably fit for the use and purpose intended by the purchaser, and the purchaser is not presumed to have such knowledge. Hence the doctrine of the implied warranty of the manufacturer.

In *Kellogg Bridge Co. v. Hamilton*, 110 U. S., 108-116, Mr. Justice Harlan, in delivering the opinion of the court, says:

"According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case, any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed."

Having shown the reasons for the rule of *caveat emptor*, as well as the reasons against its application to sales by the manufacturer, we now come to the question whether the provision of the contract requiring inspection and acceptance at the works of the plaintiff excludes any implication of warranty by the plaintiff of fitness for the intended use, and prevents the defendant, after such inspection, from complaint of latent defects, ~~although~~ not discernible and ascertainable at the time and place of such inspection.

When the cars were completed and the defendant notified to inspect them, the parties were not upon equal footing. As to defects in construction, latent and not discernible on inspection at the plaintiff's works, the plaintiff was presumed to have knowledge, while the defendant had no such knowledge and could not, as it afterwards appeared, acquire it by such inspection. The plaintiff in effect claims, that the inspection clause of the contract operated as a waiver of this inequality and applied the doctrine of *caveat emptor* to the defendant. That the defendant, in a purchase from a manufacturer of the magnitude of that in this case, would have intentionally acquiesced in being placed at such a disadvantage is not to be presumed; and such a construction, working an evident injustice to the defendant, should not be placed upon the contract, unless it appear to be the only reasonable one of which the contract is susceptible.

The works of the plaintiff were at Pullman, Illinois. The place of delivery of the cars was on board cars at Pullman Junction, or Ken-

sington, Illinois. Had there been no clause in the contract fixing the place of inspection, the defendant would have had the right to wait until the cars were delivered at Pullman Junction or Kensington, and then inspected them. Had that inspection failed to disclose any defects and the defendant then accepted the cars, but afterwards discovered defects in construction that unfitted them for use, and were not discernible at the time of inspection at Kensington, but were latent and only discernible by a trial upon the defendant's line of road, it would have had a remedy upon the implied warranty of the plaintiff, and would not have been concluded by the inspection and acceptance at Kensington, except as to patent and visible defects. This is the doctrine laid down by this court in *Kellogg Bridge Co. v. Hamilton*, *supra*, as will appear from the quotation we make from the opinion hereafter.

Had the defendant, however, discovered defects in construction at the supposed inspection at Kensington, and for that reason refused acceptance of the cars, the plaintiff would have been obliged to incur the expense and trouble of taking the cars back to its works at Pullman and there remedying the defects, and then redelivering them at Pullman Junction or Kensington. To avoid this would be a reason for the insertion in the contract of the clause calling for an inspection and acceptance at the works at Pullman, instead of at Kensington, and its acceptance by the defendant easily accounted for, because it would in no wise have been disadvantageous to defendant to have the inspection at the works at Pullman, instead of at the place of delivery.

In the third paragraph of our brief, on page 37, we argue the proposition, with a full citation of authorities, that the inspection clause of the contract does not apply to the defects discoverable only by actual use—

First, because it is the only just and reasonable construction that can be given to the contract; and

Second, because it is the construction given to the contract by the parties themselves.

We now add to that argument the proposition above stated, that the evident intention of the inspection clause of the contract was to change the place of inspection and acceptance from Kensington, the place of delivery, to the plaintiff's works at Pullman, and with no intention or expectation of changing the relative rights and obligations of the manufacturing seller and the purchaser.

In *Kellogg Bridge Co. v. Hamilton*, 110 U. S., *supra*, Mr. Justice Harlan, in delivering the opinion of the Court, says:

"* * * while Hamilton must be charged with knowledge of all defects apparent or discernible upon inspection, he could not justly be charged with knowledge of latent defects which no in-

spection or examination, at or before the sale, could possibly have disclosed. The jury have, in effect, found the false work to have been insufficient, in that the piles were not driven deep enough; that, had they been properly driven, the work would have answered the purposes for which Hamilton purchased it; and that he could not have ascertained such defects in advance of an actual test made during the erection of the bridge. It must be assumed that the company knew, at the time of sale, that Hamilton could not, by inspection, have discovered the latent defects which were subsequently disclosed. And if it be also assumed, as it fairly may be, that Hamilton, being himself a bridge builder, knew that there might be latent defects in this false work, caused by the mode of its construction, and beyond his power by mere inspection to ascertain, it must not be overlooked that he also knew that the company, by its agents or servants, were or should have been informed as to the mode in which the work had been done. That he did not exact an express warranty against latent defects not discoverable by inspection, constitutes, under the circumstances, no reason why a warranty may not be implied against such defects as were caused by the mode in which this false work was constructed. In the cases of sales by the manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But, plainly, such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not, if he chooses, insist upon an express warranty against latent defects.

All the facts are present which, upon any view of the adjudged cases, must be held essential in an implied warranty. The transaction was, in effect, a sale of this false work, constructed by a company whose business it was to do such work, to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination at the time, discover; the buyer did not, because in the nature of things he could not, rely on his own judgment; and, in view of the circumstances of the case, and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done.

The law, therefore, implies a warranty that this false work was reasonably suitable for such use as was contemplated by both parties. It was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship, should be held to indemnify its vendee against latent defects arising from the mode of construction, and which the latter, as the company well knew, could not, by any inspection, discover for himself."

Counsel for the plaintiff, in their brief, have cited many cases to support their contention of the conclusiveness of the inspection called for by the contract, to a few of which we will call the attention of the Court.

On page 26 they cite *Nofsinger v. Ring*, 71 Mo., 149. That was not a case of claimed *latent defect*, but simply an attempt by a purchaser to repudiate the inspection of his own inspector, by showing that the subject of purchase was not according to the contract. He made no attempt to show fraud or collusion between the inspector and the seller, nor that any defects existed that could not have been detected by ordinary inspection, but simply claimed the right to show that the meat (the subject of the purchase) did not come up to the contract. The Court properly held him bound by the inspection.

On page 27 they also cite *Black River Lumber Co. v. Warner*, 93 Mo., 374. The sale was of lumber to be inspected at the mill of the seller. A part was inspected and accepted, but the purchaser afterwards claimed it did not come up to the contract. He made no claim whatever that the defects were not visible and discernible on inspection. Subsequently the purchaser declined to inspect the balance of the lumber, and thereupon suit was brought and resulted in a recovery against the purchaser.

The case of *McParlin v. Boynton*, 8 Hun., 449, is also cited as "a case very much in point." In that case the contract was for the manufacture and delivery of a lot of saws, contained an express warranty, and provided for an inspection by a man to be employed by the purchaser, who should *test the saws, and file and finish the same.* The evidence shows that the inspector was at the shops of the plaintiff and remained there while the saws were being manufactured; that he had the fullest opportunities, and did give directions in relation to the tempering, and that the saws all passed through his hands as they were manufactured; that he rejected such as he thought too soft, and filed and finished the balance. The Court held that the purchaser was bound by the acceptance of this inspector. This case was afterwards affirmed by the Court of Appeals (71 N. Y. 604), without any written opinion, three out of the seven judges dissenting.

The case of *Monitor Milk Pan Co. v. Remington*, 41 Hun., 218, cited by plaintiff on page 30, is fully reviewed in our main brief on pages 44, *et seq.*

Barnard v. Kellogg, 10 Wal., 383, is also cited and quoted from by plaintiff on page 31. That case expressly recognizes the distinction we claim between an ordinary seller and a manufacturer or grower, in the application of the rule of *caveat emptor* to the purchaser. The seller in that case was not the grower or manufacturer, but a wool broker. The subject of sale was a lot of foreign wool in bales. Sam-

ples were furnished, but it was a condition of the sale that the purchaser should examine the wool, and he did examine it. Afterwards it appeared, on opening the bales, that a portion of them were packed by placing in the interior rotten and damaged wool and tags, and concealing the same by an outer covering of good wool fleeces, unknown however to the seller. The purchaser thereupon demanded indemnity from the seller, claiming that the purchase was made by sample, and that the law implied a warranty on the part of the seller that the wool should correspond with the sample furnished. He also claimed it by virtue of custom. Mr. Justice Davis, in delivering the opinion of the court, says, in addition to the quotation in plaintiff's brief:

"*That the wool was not sold by sample clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased.*"

The reason then for the decision in that case was, that as the seller was neither the manufacturer nor grower, and the sale was not by sample, no reliance was placed by the purchaser upon the judgment of the seller, and hence there was no implied warranty of fitness or of correspondence with the sample shown.

In the case of *Barnett v. Stanton*, 2 Ala., 195, cited in plaintiff's brief on page 34, *the seller was not the manufacturer*, nor were the defects complained of latent and such as could not have been ascertained on inspection.

On page 40 plaintiff cites *Van Winkle v. Crowell*, 146 U. S., 42. That was a case between a manufacturer of cotton seed oil machinery and certain mortgagees of the purchaser. The machinery was delivered to the purchaser in November, 1885, and placed in his mill so that it could be operated prior to December 1, 1885. December 4, 1885, the purchaser executed a mortgage upon the mill and machinery to secure certain creditors, and on January 2, 1886, executed another mortgage to certain other creditors covering the same property. On December 11, 1885, between the dates of the two mortgages, the seller and the purchaser entered into an arrangement whereby certain additional machinery should be furnished and other portions changed, and the balance due for the machinery already delivered was then and there settled by three notes of that date, containing a recital that they were given for the purchase money of the machinery, which the manufacturer had that day agreed to sell to the purchaser, and with a condition that the title should not pass until the purchase money was paid in full with interest. The notes not being paid, the manufacturing seller brought an action of detinue to recover the property. This Court held that, at the time of the execution of the first mortgage on December 4, 1885, the title to the

machinery was in the purchaser; that, by the transfer of it to the mortgagees, the title vested in the mortgagees, and they were *bona fide* purchasers for value; that the notes of December 11, 1885, conferred no title upon the seller which related back to a prior date; that they were subsequent to the mortgage of December 4, 1885, and as the notes were not recorded, and the second mortgagees had no notice of them, their mortgage of January, 1886, also took precedence of any title of the plaintiff by virtue of the terms of the notes.

There was no question of defective machinery, no question of breach of warranty, but simply whether the purchaser, by accepting the machinery without testing it, had acquired a title to the property which he could convey to a *bona fide* mortgagee, as against a subsequent consent by the purchaser that the seller might be deemed the owner until the purchase money was paid.

Plaintiff also cites, on page 40 of its brief, *Sheffield etc., Ry. Co., v. Gordon*, 151 U. S., 285, upon the question of finality of inspection. In that case the contract of sale was for the construction of certain furnaces with an express warranty, and also a provision that the superintendent of the purchaser *should pass upon the work every two weeks as it progressed*, and, if to his satisfaction, it should be a final acceptance by the purchaser so far as done. The evidence showed that the superintendent of the purchaser "made inspections and supervised the work from time to time, and accepted when, in his judgment, it was in compliance with the contract." This Court held, that the seller did not guarantee in the contract that the work on the plant as a whole should be adequate for the purposes intended and specified, and that, as an acceptance of the work bi-weekly was shown as it progressed, and a further acceptance of the whole on the completion was made by the superintendent, such acceptance was, in the absence of fraud or mistake, conclusive. There the parties were not placed upon an unequal footing. The superintendent of the purchaser was required to, and did, inspect and supervise the work as it progressed, and made bi-weekly acceptances of it, thus enabling the purchaser to have the same opportunity as the builders themselves of acquiring a knowledge of the material, work, design, strength and capacity, for the purpose intended.

Had the warranty not been expressed, but an implied one of a manufacturer, there would have been no reason for contending that it survived such an inspection and acceptance.

The counsel for plaintiff, on pages 41 to 50 of their brief, have made a most elaborate review of the opinion of this Court in *Kellogg Bridge Company v. Hamilton*, *supra*, and of the cases there cited, concluding their review with the statement that this case, "when applied to

the contract and facts involved in the case at bar, is a direct authority in favor of the plaintiff."

The defendant with equal confidence, after a careful reading of the plaintiff's review of the opinion and the authorities cited, claims *Kellogg Bridge Co. v Hamilton* as an authority directly sustaining the defendant's construction of the contract in the case at bar, and of the relative rights and liabilities of the parties under it.

Pope v. Allis, 115 U. S., 363, is next cited on page 50, as a case upon which the plaintiff claims that the "defendant relies with confidence," and then proceeds to show its dissimilarity from the case at bar. It is sufficient at this time to say that the defendant has never cited, nor relied upon, that case, except upon the proposition that for a breach of the implied warranty the defendant could, within a reasonable time, elect to rescind the contract. (Point 7, paragraph 8, page 63, defendant's brief.) We shall speak of this hereafter in this additional brief.

Plaintiff then cites the case of *Heilbutt v. Hixon*, L. R., 7 C. P., 438, (cited by defendant in the court below and also in its main brief on page 47) and attempts to show that it is an authority in favor of the plaintiff instead of the defendant.

That decision, in brief, was that, notwithstanding the inspection and approval at the place of shipment, as provided for by the contract, and the payment of the purchase price, *the implied warranty of the manufacturer of the shoes survived such inspection, acceptance and payment, as to latent or hidden defects* that could not be discovered by any ordinary examination of them, and which were only discovered after the shoes had been sent to France and there found, upon further examination, to have paper filling in the soles. *Upon this question there was no disagreement among the three judges.* Upon the question, however, of the *remedy* of the purchaser, two of the judges were of the opinion that, were it not for a subsequent agreement of the seller to take back the shoes found defective, the purchaser would not have the right to reject and return them, but would be left to his action for damages by reason of the breach of warranty, *and that he would not be precluded by the inspection and acceptance from maintaining such action.* The third judge was of the opinion that, even under the original contract, and without the subsequent agreement, the purchaser could rescind and return the shoes.

This case then is a direct authority in favor of defendant's contention that the implied warranty survives the inspection and acceptance at the works, so far as latent defects are concerned.

We will here call the attention of the court to the letters of the officers of the plaintiff, in response to the notification by the defendant that the brakes would not properly work.

Mr. Brown, plaintiff's General Manager, writes under date of April 13, 1888, (page 224 Record) that plaintiff's engineer would leave for Kansas City that night, and he trusted that in conjunction with the defendant the defects reported could be easily remedied. * * * * "You may rest assured that the defects will be remedied without expense to your company." And again the Chief Engineer writes that the plaintiff had arranged to send a man immediately, who would take charge of the necessary alterations on the cars, and that there would be no necessity for his leaving Kansas City *until everything was arranged to the satisfaction of the defendant.* (Page 225 Record.)

When we come to the discussion of defendant's remedy, we shall claim that these letters, coupled with the acts of the plaintiff, gave fully as good reason for permitting the rescission of the contract and return of the cars, as did the subsequent letter in the case of *Heilbutt v. Hickson.*

The cases cited by counsel for plaintiff to the fourth paragraph of their brief do not support the plaintiff's contention. Many of the cases are those where the sale was of a well known, defined, specific article—others where the seller was not the manufacturer—and some where there was no claim whatever of latent defects.

The sixth sub-division of plaintiff's brief is, that the defect "which was afterward found in the cars, as shown by the finding of facts, was one which the plaintiff could no more ascertain, either in the manufacture of the cars or in the kind of inspection that was made, than the defendant; the same opportunities for discovery were open to both; it resulted from the peculiar character of defendant's road—its steep grades and sharp curves. Hence, as to such defects, defendant had no right to rely upon the judgment of the plaintiff, in face of the provision which required the exercise of its own judgment at the plaintiff's works."

Why could the plaintiff no more ascertain in the process of manufacture the defect in these cars than could the defendant on inspection? The plaintiff knew the character of the defendant's road, and that, in view of the heavy grades and sharp curves, a properly acting brake was essential, and it undertook to construct the cars with such brake power. The plaintiff, instead of applying some well known and tried brake power, chose to apply one of its own design and invention which proved worthless. If the plaintiff could not have ascertained this during the process of design and manufacture, it certainly was not as skillful as it held

itself out to be. It was its duty to know whether the brake it designed would or would not work properly. It was the duty of the defendant, if the inefficiency of this brake could have been ascertained upon the inspection provided for at Pullman, to have also found it out before acceptance. The Court found, however, that the defect was a latent one and could not have been discovered on the inspection at the works, but only after trial and use. The Court did not find that the defect could not have been discovered during the process of design and manufacture. The plaintiff, as the inventor and designer of this new brake power, is presumed to have known more about it than the purchaser.

The seventh point of plaintiff's brief (page 64) is sufficiently answered by the statement, that the character of the defect in the brakes, and whether it was latent, or whether it could have been discovered by inspection and test at the works of plaintiff, *are purely questions of fact which were determined by the Court below.* (Findings Nos. 14, 15 and 16, pages 222 to 226 inclusive.)

The eighth proposition of plaintiff's brief (page 67) is:

"Not only were the inspection and acceptance of the cars by the defendant at the plaintiff's works complete, but their delivery by plaintiff free on board the cars effected a perfect transfer of the title to the defendant. The cars thereby became its property. It paid the freight thereon. Any risk of loss or of their proving unsatisfactory thereafter, was upon the defendant."

The correctness of this proposition is dependent upon the very question which we have been arguing, to-wit: Was the inspection at the works conclusive as to latent defects of manufacture? If not, then the delivery of the cars free on board at Kensington passed the title to the defendant subject to the condition, that, if the cars proved on trial not fitted for the use and purpose intended, by reason of defects in design and construction, that were not discoverable by the inspection at the works, then the defendant might in a reasonable time rescind the contract and return or offer to return the cars; or it might retain the cars and recover of the plaintiff the damages the defendant might thereby sustain, either by action, or by recoupment in suit by plaintiff for purchase price.

For authorities sustaining this position, in addition to those hereinbefore cited, see the cases cited to points 7, 8, 9 and 10 and the argument on pages 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, 65 and 66 of defendant's principal brief.

Those authorities also fully answer in the affirmative the question propounded in the ninth proposition of plaintiff's brief (page 68): "If

the price had actually been paid will defendant contend that it would have the right to recover it back?"

Mr. Benjamin, at Section 1349 of his work on Sales (Corbin's Edition), quotes from the author of Smith's Leading Cases, as follows:

"A warranty, properly so called, can only exist where the subject matter of the sale is ascertained and existing, *so as to be capable of being inspected at the time of the contract*, and is a collateral engagement that the specific thing so sold possesses certain qualities, but the property passing by contract of sale, a breach of warranty cannot entitle the vendee to rescind the contract and revest the property in the vendor without his consent. * * * But where the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because *the existence of those qualities being part of the description of the thing sold becomes essential to its identity*, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted."

Craver v. Hornburg, 26 Kan., 94.
Wegrich v. Harris, 31 Kan., 92.
Dow v. Fisher, 1 Cush., 274.
Bryant v. Isbaugh, 13 Gray, 607.

This is also the logical result of the doctrine announced by this Court in *Kellogg Bridge Co. v. Hamilton*, *supra*; *Norrington v. Wright*, 115 U. S., 188, and *Pope v. Allis*, 115 U. S., 363.

In the tenth proposition of plaintiff's brief (page 69), the plaintiff says:

"If a warranty of fitness on the part of the plaintiff as the manufacturer of the cars existed at all under the contract, which we deny, or if it continued after the action of defendant's duly accredited representative in inspecting and accepting the cars, which we also deny, it did not give the defendant a right to reject the cars, but, at most, a right of recoupment, which its counsel asserted at the trial below they did not claim in this action.

This doctrine is not only well established by the general current of American and English authorities, but has been distinctly announced by this Court."

This statement is incorrect. Whatever may be the English rule as to the remedy in cases of *express* warranty, on a sale of specific, ascertained goods, that rule always permits rescission in case of a breach of *implied* warranty in the sale of goods to be manufactured.

In this country, while the courts of New York seem to follow the distinction made by the English rule between the sale of

specific and ascertained articles and those to be made or supplied to order (*Day v. Pool*), 52 N. Y., 416), the great weight of authority is, that, to avoid circuity of action, a warranty may be treated as a condition subsequent at the election of the buyer, who is accordingly entitled to rescind the contract and return the goods upon the seller's breach. This is the rule of Massachusetts, Maryland, Iowa, Maine, Missouri, Kansas, Wisconsin, Indiana and New Hampshire.

2 Schouler on Personal Property (1st Ed.) 607 and 608.

The plaintiff cites *Thornton v. Wynn*, 12 Wheat., 183, as an announcement by this Court of the doctrine that the buyer, under circumstances like those in the case at bar, would not have the right to rescind the contract and return the property, but would, at most, have a right to recoup its damages.

That case was one brought upon a promissory note given for a race horse, and the defense was a breach of express warranty of soundness. The question before this Court upon that branch of the case was, as stated in the opinion (page 186):

"Whether the Court below erred or not, in stating to the jury that the alleged breach of the warranty of the horse, if proved to their satisfaction, was not a sufficient defense in this action to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff at the time of the sale."

This Court sustained the action of the Court below, evidently following the English rule in the case of an express warranty on a sale of an ascertained article.

In the opinion, however, the Court, as appears from the quotation in plaintiff's brief, would have held differently had there been proof of the seller's knowledge of the unsoundness, and had the purchaser tendered a return within a reasonable time. In the case at bar, as in all cases of executory sales of goods to be manufactured, the plaintiff is presumed to have known of the defects found in the cars, and the finding of fact is that defendant "tendered a return of the cars within a reasonable time."

In the case of *Lyon v. Bertram*, 20 How., 149, also cited by plaintiff as an authority to support the same claim, there was a contract for the sale of flour, the seller not being the manufacturer, and a portion of it was delivered, paid for and used by the purchaser. He afterwards refused to accept the balance, claiming that the brand of the flour was not the same mentioned in the contract, *but made no offer to return that which he had already received.* The Court held the purchaser liable.

In *Pope v. Allis*, 115 U. S., 363, 373, both of these cases were cited to sustain the proposition, that the purchaser in that case, having paid

the purchase money and afterwards refused to accept the goods, could not rescind the contract and sue to recover back the price of the iron, but this Court said:

"But the cases are not in point. In the first there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract."

Norrington v. Wright, 115 U. S. 188, was a case of the sale of 5000 tons of old iron rails, to be delivered at the rate of about 1000 tons per month beginning February, 1880, and all to be shipped before August 1, 1880. The seller shipped 400 tons the last of February, 885 tons by two vessels in March, 1571 tons by five vessels in April, 850 tons by three vessels in May, 1000 tons by two vessels in June and 300 tons by one vessel in July, and notified the purchaser of each shipment. The purchaser received and paid for the February shipment on its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on arrival, but on May 14, about the time of the arrival of the March shipments, having for the first time heard of the amounts actually shipped in February, March and April, declined to accept any more of the iron, and so notified the agent of the seller. Mr. Justice Gray, in delivering the opinion of this Court, says:

"The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract.

The plaintiff denying the defendant's right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action."

The counsel for plaintiff also cites *Stilwell Mfg. Co. v. Phelps*, 130 U. S., 520, and quotes, from the opinion delivered by Mr. Justice Gray, the statement of the position taken in the argument for the plaintiff,

italicising a part of it, as though it were the opinion of this Court. They omitted a few lines immediately following this statement, as follows:

"Considering the instructions given at the plaintiff's own request and the grounds on which the plaintiff excepted to the other instructions of the Court, it is, to say the least, doubtful whether this point is open, but, assuming it to be open, it clearly cannot be sustained, and the cases cited are inapplicable."

Having now shown, as we think conclusively, that upon finding that the cars were not fit for use upon defendant's line in consequence of latent defects of design and construction, not discernible upon inspection, and which were presumably known to the plaintiff, the defendant had the legal right to rescind the contract and offer to return the cars in a reasonable time, we are met with various other objections which we will now proceed to consider.

The plaintiff, on page 75 of his brief, says, *that when the defendant's line was open it put the cars into service, and when the brakes proved defective it called upon the plaintiff, not to take back the cars, but to repair the brakes, and defendant attempted to change and improve them.*

This is a misleading statement of the facts as found by the Court. The fourteenth finding (page 222 Record) is, that "on the 22nd of March, 1888, before all the cars had been shipped, the *east end* of the Twelfth Street line was completed so a car could run over that part of the line. Defendant's superintendent *took out one of the cars for trial*, when difficulty about the brakes of the cars manifested itself," and then states the nature of the difficulty. On the 23rd of March, the next day, the superintendent wrote the following letter to plaintiff:

"KANSAS CITY, MO., 23rd Mch., 1888.

"Geo. F. Brown, Esq., General Manager.

"Dear Sir:—We tried one of your cars over the line yesterday and found that the brakes would not work satisfactorily, in fact were perfectly useless. I think the reasons for this are, there being so many connections and consequently so much lost motion, that before the shoes hug the wheels the brake lever comes to the limit of the quadrant.

"Before starting out with the car we adjusted the brakes so that the shoes touched the wheels, but notwithstanding this we could not lock the wheels or even hold the cars on the lightest grades.

"As a perfect working brake is an imperative matter with us, I would like to hear from you on the subject and what remedy you propose.

Yours truly,

EDW. J. LAWLESS."

In response to that letter, the Chief Engineer of plaintiff, the inventor of the brake, "came at once to Kansas City and attempted to remedy the trouble with the brake, and on leaving claimed that he had done so."

It is evident from this that the defendant, at the time of writing the above letter, was not aware of the utter worthlessness of the brake, and, instead of rejecting the cars at that time, was willing that the plaintiff should remedy the defect if possible. This was fair dealing on the part of the defendant.

The plaintiff promptly responded, came to Kansas City, attempted to remedy the difficulty, and on leaving claimed he had done so. No further trial or test was made of the cars until about April 10th, when the whole Twelfth Street line was ready to be opened, and the cars were for the first time placed on the line. (15th Finding, page 223 Record.) Up to this time the defendant evidently supposed that plaintiff had remedied the difficulty with the brakes as its Chief Engineer claimed. Upon trying the cars, however, the same difficulty with the brakes was manifest, and the defendant, evidently still supposing that the defect could be remedied, and being willing that the plaintiff should have another opportunity to remove the difficulty, sent the letter of April 11th (Finding 15th, page 223 Record.)

It is upon this letter alone that the plaintiff bases its claim that the defendant "attempted to change and improve" the brakes. That the plaintiff construed this, at the time of the receipt of the letter, as referring simply to *changes in adjustment of the brakes, and to nothing else,* is evident from the fact that the findings, aside from the letters, are silent upon the question, presumably because the plaintiff offered no evidence whatever that the defendant actually "attempted to change and improve" the brakes. Again, if the plaintiff construed this letter as an admission that defendant had done anything to the brakes except to change from time to time the adjustment, or that it had attempted to change and improve them, why did the plaintiff promptly respond by the letter of April 13th, in which it announced that its engineer would leave for Kansas City that night, and assured the defendant *"that the defects would be remedied without expense to your company."*

This was a plain and unmistakable recognition of the right of the defendant to ask that the plaintiff remedy the defects in the brakes, and that nothing had been done by the defendant to waive that right: that the plaintiff was bound to furnish and provide proper and efficient brakes; and that it would at once again undertake to make the brakes proper and efficient and without expense to the defendant.

The letter of the defendant was a *demand* upon the plaintiff to make the brakes proper and efficient before approval and payment of the bills for the contract price, and the answer of the plaintiff, followed by the sending of their chief engineer to Kansas City to again work upon the brakes, was in effect a yielding to that demand, and a recognition that the plaintiff had no right to the contract price until it had

complied with the implied condition of the contract to furnish a proper and efficient brake.

The chief engineer of plaintiff, and the mechanic who succeeded him, at once went to work upon the cars and continued the work, going over the cars one by one and pronouncing them ready for service, thereby encouraging the defendant in attempting to use the cars with the hope and expectation that the defects had been or would be satisfactorily remedied, until the "*mechanic stated that he had done all he could do to remedy the difficulty in question, and, if it did not accomplish the end, he did not know how to remedy it.*" The same difficulty continuing in the working of the brakes, the defendant thereupon, for the first time coming to the conclusion that the brakes could not be made to work efficiently, wrote the letter of May 12, 1888, notifying plaintiff of defendant's rejection of the cars. (Finding No. 15, 225 Record.)

Under these circumstances it would seem a great injustice to say that the defendant, by the trial and use of the cars on its road during the time plaintiff was trying to remedy the difficulties, and was encouraging the defendant to such use and to think it would be done, was thereby precluded from rejecting and returning the cars so soon as it appeared that the defects were irremediable.

The court below evidently took this view, for it found that "the defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith"; nor does the fact that during the time of plaintiff's promises to repair the defects, and while the cars were being so tested, passengers were received thereon and fares collected from them, change or affect the right of the defendant to reject and return the cars. It was, at the most, only a circumstance tending to show that the defendant had assumed the ownership of the cars, the effect of which was conclusively negatived by the other features of the case above stated.

The defendant also offered to prove, that, owing to the insufficiency of the brakes, the cars were run at a loss, and that no profit resulted from the collection of fares, but the plaintiff objected and the court excluded the testimony. (Finding 21, page 227 Record.)

The plaintiff says on page 78 of its brief, that "the finding of facts shows that the brakes could have been changed for a comparatively small sum," and then claims that the only possible right defendant had was to replace the brakes by applying others and charging up the cost, which plaintiff estimates at $2500, in diminution of the contract price.

The only finding upon the question of other brakes is No. 19, as follows:

"The defendant operated upon its said road combination cars of a similar character, weighing about six hundred pounds less than the cars in controversy, which were manufactured by the Laclede Car Company of St. Louis, Mo., and were operated by a brake of a different pattern, costing from seventy-five to one hundred dollars apiece."

There is no finding that this brake could have been successfully applied to the cars in question, or as to what would have been the cost of making the change; but if it is presumable that it could have been successfully applied, why was it the duty of the defendant to undertake the expense and risk of the experiment? Why should the defendant be required to rebuild these cars with another and different brake, any more than it would to furnish and rebuild with new trucks if the difficulty had been in that part of the car?

As the plaintiff says in the opening of its argument, on page 90 of its brief, "without brakes the cars would not be complete; they were integral parts of the cars" etc. If a good and efficient brake of another pattern could have been applied to the cars and caused them to work successfully, why did the plaintiff not procure them and make the change, instead of persisting in foisting upon the defendant *the design and invention of its own officer*, even after the inefficiency had been clearly demonstrated, and its own mechanic had declared "*that he had done all that he could do to remedy the difficulty in question, and if it did not accomplish that end he did not know how to remedy it*"?

In the 16th and 17th propositions of the plaintiff's brief, on page 87, it is suggested by way of inquiry, *whether it was not necessary that the defendant return or offer to return the cars to Pullman Junction or Kensington, and also asking upon what principle plaintiff could be required to repay to defendant the freight paid by it from Kensington to Kansas City.*

Mr. Benjamin, in his work on Sales, at Sec. 1348, tersely says:

"*It is sufficient for him (the buyer) without returning the goods to give notice to the seller that he rejects them, and that they remain at the seller's risk.*"

In Story on Sales (4th Ed.), Sec. 426, it is said:

"*In all cases, however, when the buyer is entitled to rescind the contract of sale, an offer to return is considered as equivalent to a return, although it be not accepted by the vendor.*"

In 2 Schouler on Personal Property, 610, it is said:

"In case of non-acceptance for cause, the buyer has been permitted to claim the reimbursement of the freight and transportation expenses to which he has been put, and not only to demand a settlement of the same before giving up possession of the rejected goods, but, upon the seller's neglect to reimburse him within a reasonable time after notice given, to sell what may be suitable to make him whole."

The proposition seems clear to us that the buyer, being without fault, having exercised the right to rescind the contract of sale in consequence of the fault of the seller, is entitled to be repaid the money actually and necessarily paid for freight and transportation from the place of delivery to the point where the cars were to be used.

If, however, this court should be of the opinion that we are not entitled to recover for the freight paid, then we ask the court, if it shall find no other error in the judgment of the court below, to affirm the same on condition that defendant remits the judgment in its favor for the freight and drayage paid.

The last proposition of the plaintiff's brief (page 88) is: "*No disposition is made in the finding of facts of the claim for extra items made by the plaintiff in the petition.*"

No exception was filed by plaintiff to the finding of facts by the court below, upon the ground that the court had failed to find upon the claim for extra items.

After the first finding of facts was filed, the plaintiff filed a large number of exceptions and requests for modifications and for further findings, *but asked for no finding upon this claim.* (Pages 212 to 217 Record.)

Plaintiff asked, however, for a declaration of law "that the plaintiff was entitled to recover of the defendant the contract price of said cars, with interest." Possibly, if the attention of the court below had been called to this claim for extra items, it would have made a finding either that there was no testimony, or not sufficient testimony, to support it. As it is, this objection cannot now be urged in this court.

SUMMARY OF FACTS.

Briefly stating the facts found by the court below, they show:

That the plaintiff was a manufacturer of cars at Pullman, Illinois;

That the defendant was constructing a cable street car line on Twelfth Street, in Kansas City, Mo., which line had heavy grades and sharp curves;

That, at the request of the defendant, by letter of May 13th, 1887, Mr. Charles Pullman, the General Agent of the plaintiff, came to Kansas City to negotiate for the construction of the cable combination cars required by defendant for use upon this line, and while there acquired a general knowledge of its grades and curves;

That upon his return the plaintiff, by letter of June 21st, 1887, enclosed to defendant a proposition to construct 25 of those cars and deliver them, free on board cars, at Pullman Junction or Kensington, Illinois, for $2,000 each, the cars to be inspected and accepted at the plaintiff's works;

There was attached to this proposition "general specifications" regarding the construction, with many of the particulars of design and manufacture left *blank*, and among those left blank was the specification as to *brake-power*;

This proposition was accepted in writing by the defendant on June 27, 1887, and enclosed to plaintiff in a letter of same date, in which the cars were spoken of as for the defendant's "Twelfth Street line;"

That in July, 1887, Mr. Twyman, the Chief Engineer of plaintiff, came to Kansas City for the purpose of determining the general features of the cars, the shortest curves and other physical conditions of the road, and while there had access to the plans and profiles of the road in the office of the defendant's engineers;

That defendant's engineers submitted some modifications of the original specifications, but *made no specification or direction concerning the brake-power then or at any time afterward*, except *that the brakes should be extra heavy and extra powerful;* nor did the plaintiff, at any time during construction, furnish to defendant any plans or specifications for the brakes they intended to apply to the cars, but placed upon the cars a brake designed and constructed by Mr. Twyman, plaintiff's Chief Engineer;

That in December, 1887, at plaintiff's request, defendant's superintendent went to Pullman, found 10 or 12 cars apparently completed and standing on the floor of plaintiff's shops, and then made a thorough inspection of them and announced that he was satisfied with them, and requested that the others be finished in the same way and forwarded;

That five cars were shipped by plaintiff Feb. 24, eight cars March 10th, and two March 17th; that on March 22d, and before the shipment of any more cars, the east end of defendant's line was completed, and defendant took out one of the cars for trial, when this difficulty with the brakes appeared—"when the brakes were so adjusted that they could be used to stop the car on a straight, level track, in passing around a curve or up a grade they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars;"

On March 23d the defendant notified plaintiff of this difficulty, stating, that "*as a perfect working brake is an imperative matter with us I would like to hear from you on the subject and what remedy you propose;*"

That in response, Mr. Twyman, the inventor of the brake, came at once to Kansas City and attempted to remedy the trouble with the brake, and on leaving claimed that he had done so;

That five more of the cars were shipped by plaintiff March 27th, and the balance March 30, 1888;

That about April 10th, and shortly after Mr. Twyman had left, the entire Twelfth Street line was ready to be opened, when the cars were for the first time placed on the line; the same trouble in operating the cars was manifested, and on April 11th the defendant notified the plaintiff of it, and insisted upon the cars being made right before approval or payment of the bills rendered for the purchase price;

That, in response to this, plaintiff on April 13th wrote defendant that Mr. Twyman would go at once to Kansas City, and *assured the defendant that the defects would be remedied without any expense to it;* Mr. Twyman at once came to Kansas City, did some work on the brakes, but being called away left for Chicago, stating that he would soon return and complete the work; instead of returning he wrote to defendant that he was sorry not to be able to return as soon as he anticipated, but that plaintiff had arranged to send a man at once, *who would take charge of the necessary alterations on the cars, and that there would be no necessity for his leaving Kansas City until everything was arranged to defendant's satisfaction, and that he, Twyman, would probably come out again at the end of the week;*

That thereupon plaintiff's mechanic, Overton, came to Kansas City, "*with type written instructions from Mr. Twyman,*" and went to work to remedy the defect in the brakes. He went over the cars one by one, and pronounced them ready for service, stating that *he had done all he could to remedy the difficulty, and if it did not accomplish that end he did not know how to remedy it;*

That, notwithstanding the work and effort of Overton, the same difficulty continued to be manifested in the operation of the cars as to the working of the brakes, and thereupon defendant, by letter of May 12th, notified plaintiff that defendant rejected the cars and that they were subject to plaintiff's order.

It is apparent from these findings up to this point, that defendant entrusted the question of brake power entirely to the skill and experience of plaintiff, and relied upon the assurances of the plaintiff that the defect in the brakes could and would be remedied; and that the defend-

ant retained the cars, and continued the trial and test of them, until the announcement by plaintiff's mechanic, Overton, *that he had done all that could be done to remedy the difficulty*, when, finding that the difficulty with the cars was not removed, defendant for the first time became aware of the fact that the defects were incurable, and then promptly rejected the cars.

The findings of fact further show, that the defect or inability of the brakes was not apparent or discoverable on inspection at the plaintiff's works, but was a latent one which did not develop on inspection, and was only discoverable when put into use on defendant's track or upon a similar track;

"That the defendant did not use or operate the cars longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith;"

That, during the time defendant was testing the cars on the road, and while believing the assurance of the plaintiff that the defects in the cars could and would be remedied, passengers were received on them and fares collected by defendant; defendant offered to prove on the trial that, owing to the insufficiency of the brakes, *the cars were run at a loss, and that no profit resulted from collection of fares*, but upon plaintiff's objection, this was excluded by the court;

That the defendant paid the freight and drayage on the cars to Kansas City, to the amount of $1,088.50.

Whereupon the court found the issues for the defendant and rendered judgment accordingly.

These findings of fact we have shown to be sufficient in law to support the judgment of the court below, and we respectfully ask this court to affirm the same.

WALLACE PRATT,
FRANK HAGERMAN,
Counsel for Defendant in Error

Office Supreme Court, U. S.
FILED.
JAN 14 1895
JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1894.

PULLMAN'S PALACE CAR COMPANY,
PLAINTIFF IN ERROR,
v.
METROPOLITAN STREET RAILWAY COMPANY,
DEFENDANT IN ERROR.

No. 146.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Reply Brief for Plaintiff in Error.

JOHN S. RUNNELLS,
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Attorneys for Plaintiff in Error.

WASHINGTON, D. C.:
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Reply Brief for Plaintiff in Error.

I.

In addition to the authorities cited under paragraph III of our original brief, we desire to call the attention of the court to the very recent case of Morris *v.* Bradley Fertilizer Company, decided by the United States circuit court of appeals, third circuit, Mr. Justice Shiras sitting with the circuit judges, reported in 64 Federal Reporter, 55. The action was brought to recover the purchase

price of a grinding mill bought by the defendant from the plaintiff, and the defence was based upon the implied warranty of fitness for the purposes for which the mill was purchased. A judgment in favor of the plaintiff in the court below was affirmed by the court of appeals. Dallas, circuit judge, in delivering the opinion of the court, says :

" If a man buy an article for a particular purpose, made " known to the seller at the time of the contract, and rely " upon the skill or judgment of the seller to supply what " is wanted, there is an implied warranty that the thing " sold will be fit for the desired purpose. (Benj. Sales, " 2d Am. ed., sec. 661). Where, however, a positive and " unqualified order for a specific article is given, this rule " is not applicable. In such cases there is an implied con- " dition, according to the English authorities, or, as sub- " stantially the same thing is called by our courts, an im- " plied warranty, that the article supplied shall correspond " with the designation, description, or exemplar, as the " case may be, by which the thing purchased had been " defined. But the seller's undertaking does not extend " beyond this guaranty of identity. There is no implied " collateral agreement that the article sold is fit for the " use for which the buyer designs it. He buys on his " own judgment, and if that turns out to be at fault he " must himself bear the burden of his disappointment. " These principles are well settled, and do not appear to " be challenged, but it is contended that the circuit court " erred in its application of them to the facts which were " before it. The contract between these parties was for " the purchase and sale of a 'Griffin Mill,' and such a " mill was delivered. The action in the court below was " for the recovery of the agreed price, and the defence " was that the mill would not do the work for which it was " wanted. The business of the defendant below was the " grinding of limestone without first drying it; conse- " quently he required a mill which would grind it when in a " wet condition, and as the mill in question would not do

" this it was useless to him. Is the seller liable for the " resultant loss? If he is, as fraud is not charged, and " no express warranty is alleged, it must be by reason of " the existence of an implied warranty of fitness, which, " as we have seen, cannot exist unless it appears, first, " that the purpose for which the mill was bought was suf- " ficiently made known to the seller; and, second, that " his judgment as to its suitability for that purpose was " relied upon. * * * Even if full disclosure of the " purpose for which the mill was intended had been made, " an implied warranty of fitness would not have resulted, " because of the absence of a further necessary con- " stituent of such warranty—reliance on the judgment of " the seller."

The same element which was held to be vital to the defence in the Morris case is found in the case at bar. The defendant did not rely on the judgment of the plaintiff in regard to the fitness of the cars for its purposes, because the contract required the defendant to exercise its own judgment in passing upon their fitness, and this it did through its superintendent, Lawless, who inspected and accepted the cars at the plaintiff's works.

II.

As to what is meant by the word "inspected" in that provision of the contract requiring the "cars to be in- " spected and accepted at our works," the language of Mr. Justice Miller, speaking for the court, in People *v.* Compagnie Gen. Transatlantique (107 U. S., 59), is most expressive. He says, on page 62:

" What is an inspection? Something which can be ac- " complished by looking at or weighing or measuring the " thing to be inspected, *or applying to it at once some cru-* " *cial test.*"

In the case at bar defendant's inspector, Lawless, was satisfied with the test, which by his acceptance he determined to be crucial, by examining "the brakes by having "them worked from within and observing their operation "and application while under and at the side of the car" (p. 30). If any additional tests were requisite to ascertain absolutely whether the brakes would work while the cars were being operated on the grades and curves of defendant's line, its inspector omitted to make them and failed to called upon the plaintiff for any facilities therefor; and for all damages which resulted from such omission and failure, defendant must suffer and not the plaintiff. He had the authority to decide, and did decide, that the tests which he made were sufficient; and that the brakes, the mechanism of which and every part of which were exposed to his view, were satisfactory.

In Wiggins *v.* Burkham (10 Wall. 129) the court says, relative to the question of what is reasonable time in a given case, that "where the facts are clear, it is always a "question exclusively for the court." Hence the finding that defendant did not use the cars longer than was reasonably necessary to ascertain the defect in the brake will not control if this court should be of a different opinion.

Likewise, where the facts are clear as to the exact nature of the defect in the brake as in the case at bar, whether it is a latent one or not, we respectfully submit, is a question exclusively for this court.

III.

An examination of the cases cited by defendant will show that many of them were cases of express warranty, and in the cases where recovery was had on the implied

warranty of fitness there was no provision for inspection and acceptance at the manufacturer's works.

Other cases have no application to the case at bar, because they depend on different facts.

The language of Mr. Justice Harlan in this regard, in the Kellogg Bridge Company case, will bear repetition, where he says that "The fundamental inquiry must always "be whether, *under the circumstances of the particular* "*case*, the buyer had the right to rely and necessarily "relied on the judgment of the seller and not upon his "own."

The following review of some of defendant's cases will serve to illustrate our contention :

Philadelphia & Reading Coal & Iron Co. *v.* Hoffman (4th Atlantic Reporter, 848) was a case of the purchase of iron by a dealer from a manufacturer. The contract was for the purchase of iron of the quality known as "strictly neutral." It proved to be of the qualities of "cold short" and "red short." Damages were allowed for breach of contract. There is no mention of inspection in the case.

Best *v.* Flint, 5 Atlantic Rep. 192. Plaintiff sold to defendant nine hogs to fill up a car. Court held there was an implied warranty that the hogs would be marketable, and as they were not so there was a breach of warranty. "It was not a sale of nine definite or specific hogs which "plaintiff had in his possession, which the defendant Flint "inspected, or could have inspected. Six of the hogs were "purchased by the plaintiff after the contract was made, "and, with the three which he had purchased the morn- "ing of the sale, made the nine that were delivered to the "defendants." * * * "There is no doubt but that the "rule of *caveat emptor* is applicable, so far as quality is "concerned, in the absence of fraud, to sales of ascer-

" tained specific chattels *which the purchaser has in-*
" *spected;* but where the contract is to supply a certain
" kind and quality of chattels for a particular purpose
" known to the vendor, *which the vendee has no oppor-*
" *tunity to examine before delivery*, there is usually an
" implied warranty that the chattels supplied shall be fit
" for the special purpose intended by the vendee."

Reynolds *v.* Palmer (21 Fed. Rep. 433); charge to jury by Dick, J. Suit to recover for breach of contract in the sale of tobacco, in that the tobacco was "frost-bitten," and assurances to the contrary were made before the sale. Defendant went to the barns where the tobacco was stored to examine it, but claimed that, on account of the condition of the tobacco as to storage, an examination could not be made. On this phase of the case the court said: " In all cases where he has an opportunity of inspecting
" the goods and fails to do so, he cannot properly com-
" plain if the goods do not come up to his own expecta-
" tions and the representations of the vendor. If an op-
" portunity is afforded by the vendor, and an inspection
" is practicable, it must be made by the purchaser, no
" matter how disagreeable and inconvenient it may be.
" * * * If the purchaser has an opportunity of seeing
" and examining for himself he should rely upon his own
" judgment, and accept the consequences of mistake; or
" he should protect himself by an express warranty.
" There was a written contract containing an *express* war-
" ranty that the tobacco was in 'sound order.' Whether
" there was a breach of the *express* warranty was left to
" the jury, who found for the plaintiff."

Beals *v.* Olmstead, 24 Vermont, 114 (1852), sale of hay, where defendant sold plaintiff hay for feeding oxen in spring and summer. *Plaintiff told defendant* that he wanted the hay for a particular purpose, and that *he would*

not examine it, as he could tell nothing about it from examination. Defendant said it is good hay and cut in season. It turned out that it was not good hay, and was not cut in season. Held, that there was an *express* warranty relied upon by plaintiff, and the statements of defendant were the basis of sale. Suit for recovery of the money paid by plaintiff for the hay at time of purchase. Court below directed a verdict for defendant, which Supreme Court reversed on account of above, viz: The statements of defendant as to quality, which were relied upon by plaintiff.

Curtis & Co. Mfg. Co. *v.* Williams, 48 Ark. 325; 3 S. W. Rep. 517. Defendant purchased from plaintiff a pair of trucks and eight tram-car wheels manufactured by it. Defendant represented the same were good both in quality and workmanship. Plaintiff's evidence showed wheels were defective, and recovered a verdict for one hundred dollars, which Supreme Court affirmed. "Proof " of an express warranty by the defendant of the quality of " this machinery was not essential to a recovery. Ordi- " narily, upon sale of a chattel, the law implies no war- " ranty of quality. But there are exceptions to this rule as " well established as the rule itself. One of these excep- " tions is where a manufacturer undertakes to supply goods " manufactured by himself, to be used for a particular pur- " pose, *and the vendee has not had the opportunity to in-* " *spect the goods.* In that case the vendee necessarily " trusts to the judgment and skill of the manufacturer, " and it is an implied term in the contract that he shall " furnish a merchantable article, reasonably fit for the pur- " pose for which it was intended."

Bird *v.* Smith, 12 Q. B. 786. Suit to recover for the price of iron rails under *a warranty that they were in quality equal to any rails made in Staffordshire.* Ques-

tion upon the sufficiency of a plea of performance of contract, because the rails were inspected. "A complaint " of non-performance of one part of a contract is not " avoided by alleging performance of another part; the " defendant must, therefore, contend that the two parts " are not separate and distinct but forming one subject- " matter of promise only, and that the effect of such " promise is that the approval and acceptance by the agent " should establish that the stipulation for quality had been " performed, or that in a manner he had been released " from the performance thereof. If the approval and ac- " ceptance by the inspectors were conclusive evidence, or " indeed evidence at all, of the performance of the stipu- " tion for quality, the breach should have been traversed, " or performance pleaded, and in this point of view the " present plea pleads evidence merely. If they amount " to a release from the stipulation of quality the plea " should have been of a release; but we see no reason " for putting this construction on the contract; each stip- " ulation is in itself distinct, and in its nature, as an " absolute warranty for quality may well be required in " addition to a provision for inspection and approval, to " guard against defects which inspection cannot discover."

Bagley *v.* Cleveland Rolling Mill Co., 21 Fed. R. 159. Plaintiffs were manufacturers of steel vices and required steel of a peculiarly strong temper for the facing of the jaws of the vices, and obtained from defendants samples of steel which plaintiffs tested and returned with suggestions as to the preparation of other samples, until the kind of steel was produced that was satisfactory, and accordingly orders were sent to defendants and filled satisfactorily; the subsequent orders were for steel like "last order." Finally an order of steel was sent which proved worthless. The court held there was really no

question of warranty in the case, but a contract to supply goods of an agreed character, and that the case was one of a breach of contract in supplying the kind of steel agreed upon, and that plaintiffs were not required to test the steel of the subsequent orders, as tests had been made in the first place and a grade thereby established which was to govern the quality of steel thereafter sold; and upon discovery of the breach of the contract the plaintiff could rescind the same and recover the damages incident thereto. "It is undeniably true that when a "party who is entitled to the benefit of a contract can "save himself from a serious loss arising from a breach "of it by reasonable exertions, he will not be permitted "to charge the delinquent with damages which arise in "consequence of his own inactivity. Warren *v.* Stoddart, "105 U. S. 229. Good faith and good logic require that "he be confined to a recovery of those damages only "that arise from the default of the other party. If the "plaintiffs here had had any just reason to suppose that "the steel they were about to use was unfit for the pur-"pose, they would not be permitted to shut their eyes to "the probable consequences, and when these proved "disastrous to fall back upon the defendants for in-"demnity. But they are not to be deprived of compen-"sation to the extent of their loss upon the theory that "they owed any active duty of investigation and experi-"ment to the defendant. They had a right to assume "that the steel sent them was what the defendant under-"took to send them, and no implication of negligence on "their part can be indulged in, in the absence of testi-"mony to indicate that its unfitness was observed before "it was used." This case might, possibly, have some application if the facts in our case were that only the first cars were inspected and accepted, and other orders

were made for cars like those of the first order, the "same quality as last ordered," and on the undertaking to fill the order, cars were sent inferior in quality to those embraced in the first order. But the cars in our case were all in one order, covered by one contract which provided that cars were to be inspected and accepted at the plaintiff's works. True it is, only the first cars were formally inspected and accepted, but upon the inspection and acceptance of the first lot of cars, being satisfactory to defendant, Lawless ordered that the remaining cars be constructed the same as the first, which was faithfully done. There never has been a claim made that the remaining cars were inferior in quality, or different in construction from the first lot.

Norrington *v.* Wright, 115 U. S. 188. There was no question of defective construction or of defective material in this case. There was a contract made in Philadelphia for the sale of "5,000 tons of iron rails for shipment to a "European port or ports at the rate of about 1,000 tons "per month, beginning February, 1880, but the whole con-"tract to be shipped before August 1, 1880, at $45 per ton." The court held the sellers were bound to ship 1,000 tons per month from February to June, inclusive, except that slight and unimportant deficiencies may be made up in July, and if only 400 tons were shipped in February and 885 tons in March, and the buyer accepted and paid for the February shipment on its arrival in March at the stipulated price and above the market value, and in ignorance that no more had been shipped in February and was first informed of that fact after the arrival of the March shipment and before he accepted or paid for either of them, he may rescind the contract by reason of the failure to ship about 1,000 tons in each of the months of February and March, as time was a condition precedent

of the contract. In the Metropolitan case there was no rescission of the contract claimed as to the time of delivery of the cars. There was inspection and acceptance with a full knowledge of the facts of construction, material, and time of shipment.

Filley *v.* Pope, 115 U. S. 213. This case is similar to that of Norrington *v.* Wright, *supra*, except the breach of the contract was in the place instead of in the time of shipment. Iron rails were to be delivered at New Orleans, shipment to be made from Glasgow. The shipment was made from Leith, and the rails arrived before they would have arrived if shipment was from Glasgow. It was held a non-compliance with the contract which would justify its rescission by the buyer.

Dawes *v.* Peebles, 6 Federal Rep. 856. This case involved the sale of a soda apparatus by plaintiffs under a special contract that the use of it would yield a profit of five dollars per day to defendants by June 1st, and it would work as well as any other apparatus, and defendants claimed that plaintiff said that if the apparatus did not yield them a profit of five dollars per day, and if it were not perfectly satisfactory to them, they need not take it. Defendants admitted the profit of five dollars per day, but claimed the apparatus did not work satisfactorily. The contract was a verbal one, and one for a jury to determine. There was a verdict on the facts for the defendants. The court said: "If the jury are satisfied from the evidence that the con- "tract was that the plaintiffs were to furnish the soda appa- "ratus, fixtures, and pumps, and that the defendants should "receive from its use five dollars per day until the first of "June, and it was to be equal in its workings to that of any "other manufacturer of like character, and they find from "the evidence that it was of that character and yielded that "amount, then the plaintiffs are entitled to your verdict for

" the contract price. Defendants claim, however, that the " contract was that it was to yield them five dollars per day, " and was to be entirely satisfactory to them to the first of " June. If the plaintiffs, *without the defendants having an* " *opportunity of examination*, agreed to supply them with " or manufacture for them a soda apparatus, the law im- " plies that they undertook that it should reasonably answer " the purpose for which it was intended by the parties."

Matthews *v.* Fuller, 8th Ill. App. 520. Fuller & Co. were manufacturers of varnishes, and their agent persuaded Matthews, who was engaged in the business of upholders' supplies, to also sell the varnish, and warranted that it would be made of the best gums and turpentine—the best manufactured in the eastern country; he would guarantee them in every respect, and if they were not satisfactory in every respect they would be subject to Matthews returning them. The varnish turned out to be of a bad and inferior quality, and composed of benzine instead of turpentine, and was in reality worthless. It was held to be not as warranted by the terms of the contract, and that Matthews had the privilege of returning it, if it was not satisfactory to him, if it was done within a reasonable time, under all the circumstances. It was shown that Fuller's agent solicited Matthews to undertake the business, and Matthews, upon agreeing to do so, said that he knew nothing about varnish, and that he could not afford to handle a poor article on account of his other trade, and added, " *I shall leave it with you en-* " *tirely* to give me a good article, and at lowest cash price " in the market," and this was agreed to.

In Dorr *v.* Fisher (1 Cush. 274) the court uses language which defendant has not cited, as follows: " To " maintain this action it is not necessary to set out the " contract of sale with its conditions and limitations. It

" is enough to prove an agreement for a sale of the goods " at a fixed price in money, or without a price (in which case " the law implies an agreement to pay as much as they " are worth), and an actual delivery, whereby a debt " arises. A delivery by the vendor implies an acceptance " by the vendee. An offer by the vendor not accepted " by the vendee may be a good tender, and a good per- " formance on his part, but it is not a delivery. If there " are conditions annexed to the agreement of sale respect- " ing the quality or other circumstances, which are not " complied with by the vendor, *the vendee should decline to* " *accept the goods; but if he does accept them the ac-* " *ceptance is a waiver.*"

In Weybrick *v.* Harris (21 Kan. 92), Judge Brewer held that "A purchaser cannot retain and use property and at " the same time say he repudiates and rescinds the con- " tract to purchase."

IV.

"It must be taken as settled law that, when the buyer " does not rely upon the judgment of the manufacturer, " there is no implied warranty." This language is taken from the original brief for defendant in error, on pages 57 and 58. This is a virtual concession that its defence of implied warranty of fitness cannot prevail. The contract gave the defendant no right to rely upon the judgment of the plaintiff as to whether the cars which it contracted to make would be suitable for defendant's Twelfth-street line, and required defendant to determine that fact for itself and exercise its own judgment in regard thereto when the cars were ready for delivery. The cars were built under specifications approved by defendant's engineers and supplemented by them; and while the brake power was left

blank in the specifications, and no "plans or specifications " of brakes were furnished to the defendant during their " construction," the brakes themselves in their completed state were shown to defendant's inspector, and their every part and the manner of their operation and application were examined and approved by him.

In the face of the requirement of the contract to inspect and accept the cars at plaintiff's works and what was actually done under it, how it can be claimed that defendant relied upon the judgment of the plaintiff as to the efficiency of the brakes which its own inspector particularly examined and approved, it is difficult to understand.

V.

Defendant's counsel in their brief quote the following from Noonan *v.* Bradley (9 Wall. 394, 405):

" When an instrument is susceptible of two construc- " tions, the one working injustice and the other consistent " with the right of the case, *that one should be favored* " *which standeth with the right.*"

The contract in the case at bar is susceptible of but one construction, and that construction undoubtedly "standeth with the right." To sustain the defendant's view would work the grossest injustice by requiring the plaintiff to have its cars subjected to a different test from that provided by the contract, at a different place from that designated therein, with the risk of having the cars thrown upon its hands after they had been used for more than a month and turned into second-hand property—a risk which by the terms of its contract it had never assumed.

Defendant's counsel also quote and apply certain rules laid down by Dr. Lieber in his Hermeneutics for determining the true construction of contracts. Let us quote and apply the same rules from our standpoint:

"5. No text imposing obligations is understood to de-
" mand impossible things."

The construction of this contract making the manufacturer liable upon its implied warranty of fitness for a defect which no care in manufacture would prevent and which "could not be discovered without a practical test " on the defendant's railroad track or over similar track," and which was "only discoverable when put into use on " the defendant's track or similar track," with its severe grades and sharp curves, would impose an obligation on plaintiff demanding an impossible thing, to wit, the discovery of a defect under circumstances which rendered its discovery impossible.

"6. Privileges or favors are to be construed so as to
" be least injurious to the non-privileged or unfavored."

It was a privilege and a favor granted by the plaintiff to the defendant to permit the cars when built to be passed upon by its own inspector, and if unsatisfactory, rejected by him. The inspector whom defendant sent was a cable railway engineer of experience in the construction and *practical operation* of cable cars, with an accurate knowledge of the grades and curves upon defendant's Twelfth-street line. Plaintiff did not have the privilege of passing upon its own work, and its engineer was not favored with experience in the practical operation of cable cars, and it would be most injurious to the plaintiff to be charged with the consequences of a defect not discovered by defendant's own inspector.

"7. The more the text partakes of the nature of a com-
" pact or solemn agreement, the closer ought to be its
" construction."

The contract in the case at bar is a compact and solemn agreement of the clearest and most unambiguous character. Therefore the closer—*i. e.*, the stricter—should be its construction. Nothing should be added by way of implication to a contract so complete in its terms, and certainly not the implication contended for, which is diametrically opposed to the plain provisions of the express agreement.

" 8. A text imposing a performance expresses the mini-
" mum if the performance is a sacrifice to the performer,
" the maximum if it involves a sacrifice or sufferance on
" the side of the other party."

To permit the quality of its work to be passed upon by the defendant's inspector, and rejected if it did not meet his approval, involved a sacrifice and sufferance on the part of the plaintiff. By allowing defendant, therefore, to say whether the cars which plaintiff had made were satisfactory, the maximum was expressed, and defendant was required to judge of their fitness finally and irrevocably.

" 10. The effects which would result from one or the
" other construction may guide us in deciding which con-
" struction we ought to adopt."

To sustain the defendant's view would cause the plaintiff, in the face of an express contract to the contrary, and admitting of but one construction, to risk the loss of fifty thousand dollars' worth of property, five hundred miles and more away from its works, where it had no tools or machinery or skilled workmen to remedy any defects which might be discovered, and to bear the consequences

of a defect which no care in manufacture would have disclosed.

"12. Yet nothing contributes more to the substantial "protection of individual liberty than a habitually close "interpretation and construction."

This is exactly what we have been contending for, and if this court will but give the contract under consideration a close and at the same time a fair and proper interpretation and construction, and not add a contradictory provision by implication, a reversal of the judgment of the court below must follow inevitably.

VI.

The fourth paragraph of defendant's original brief reads as follows:

"Even if we are wrong as to the construction of the "contract, yet the fact that the contract provided for an "inspection does not exclude the implied warranty if the "defect was not discoverable except by use on the Twelfth-"street line."

If this be true, then no contract can exclude the survival of the implied warranty of fitness after inspection. The contract provided not only for inspection, but acceptance, at the plaintiff's works, and no reservation whatever was made therein of a right to further test the cars upon its line after they had been examined and approved by the inspector of defendant's own choosing and after he had subjected them to all the tests which he required. But if an express contract can exclude the continued existence of the implied warranty of fitness after inspection and acceptance, and of this there can, of course, be no doubt,

it is excluded beyond a peradventure by the contract under consideration. To show the utter absurdity of defendant's contention, let us assume that the completion, not of the cars, as stated in the contract, but of defendant's Twelfth-street line, had been delayed by "strikes "and unavoidable hindrances," or from any other cause, could defendant have resisted a suit for the purchase price of the cars on the ground that it had the right to make a practical test of their fitness upon its line, and that the suit would have to remain in abeyance until its line was completed and the test made?

VII.

Under the eleventh paragraph of defendant's original brief, its counsel betray the very reasonable fear, we respectfully submit, that the court would not adopt their construction of the inspection clause of the contract, and seek to avoid the consequences of such a result by claiming that compliance with that part of the contract was waived by the acts of the parties. This is another way of stating that the written contract was modified by a subsequent agreement. This alleged modification, which was not proved at the trial nor found as a fact by the court below, is set forth in the answer in the following language:

"Said cars were to be delivered at Kansas City, Mis-"souri, and tested by defendant before acceptance. The "provisions as to acceptance and inspection at the works "of plaintiff were abandoned and set aside" (p. 21).

In Utley *v.* Donaldson (94 U. S. 29), where there was a written contract for the sale of certain bonds, and a subsequent parol modification claimed, the court says:

"There can be no contract without the mutual assent "of the parties. This is vital to its existence. There "can be none where it is wanting. It is as indispensable "to the modification of a contract already made as it was "to making it originally. * * * It is essential to the "validity of a contract that the parties should have con- "sented to the same subject-matter in the same sense. "They must have contracted *ad idem*."

The opinion then quotes the passage from Darnley *v.* Proprietors (2 L. R. H. L. 43, 60), which appears on pages 61–2 of our original brief.

The facts in the case at bar, fully discussed in our original brief, show that the plaintiff never assented to any modification of the contract or understood that any modification was claimed.

On page 71 of their original brief, in speaking of the subject of the subsequent modification of the contract by the acts of the parties, defendant's counsel say, in answer to our contention that the modification of the contract, even if made, must rest upon a new consideration, that "the books do not so say, nor is there anywhere an in- "timation to be found to such effect."

So far as the matter of what the books say is concerned, we beg leave to repeat the language of Mr. Justice Miller in Hansbrough *v.* Peck (5 Wall. 497), in disposing of a similar claim that a written contract had been modified by a subsequent oral agreement. He says:

"But the true answer to this part of the case is that "the arrangement was not in writing, *nor any considera-* "*tion passing between the parties that could give validity* "*to it.*"

As to there being no intimation anywhere to be found to the effect that a consideration is required for the modi-

fication of a contract, we beg leave to refer to the following allegation of defendant's answer in this case, where, after alleging the modifications of the contract above quoted, the following averment is made: "*There was a "consideration for each of the contracts set forth herein*" (p. 22).

VIII.

In the "additional brief for defendant in error" its counsel, on page 3, concede the decisiveness of the decision in the case of Seitz *v.* Brewers Refrigerating Company (141 U. S. 516), provided the cars made by the plaintiff had been of a designated and defined pattern, even though the brakes with which they were equipped were invented by its chief engineer. But the cars tendered by plaintiff to the defendant for inspection were designated and defined at the time its inspector examined them. They had been built in accordance with specifications approved by its engineers, except in respect to the brakes; and while the brakes had not been specified nor any plans or working models furnished and approved, they were in a finished state, adjusted and completely open to view at the time defendant's inspector was invited to examine the cars, and he saw their operation and application, and accepted the same as satisfactory. In the Seitz case the machine was "described and definite" at the time the contract was executed. In the case at bar the cars were "described and "definite" at the time of inspection and acceptance.

IX.

In discussing the doctrine of *caveat emptor* and its application to contracts of sale, defendant's counsel say in their additional brief: "The reason for the rule is that

" both seller and buyer stand upon an equal footing—one " presumably having no knowledge or information of the " quality of the article sold superior to the other."

This is exactly our case if the findings of fact by the court below as to the nature of the defect in the brakes are to prevail. Under those findings nothing short of an actual test upon defendant's track or similar track would have disclosed the defect which existed. Plaintiff's engineer may have been never so skilful; his plan and execution of the brake may have been theoretically faultless. Defendant's inspector, who was himself a cable railway engineer of experience, not only in the construction but in the practical operation of cable cars, which plaintiff's engineer was not, found the brakes, after thorough examination, to be all that he desired.

To escape the application of the rule of *caveat emptor*, it will not do to say that the plaintiff, as the maker of the cars, was presumed to have knowledge of the defect in the brakes as stated by defendant's counsel, because the court below found that the defect which existed could not be discovered at the place where the cars were made, but only by an actual test upon defendant's line, more than five hundred miles away from the place of manufacture.

In the hope of avoiding the result which the finding by the court below of the nature of the defect in the brakes renders inevitable in relieving plaintiff from all liability, defendant's counsel say: " The court did not find that the " defect could not have been discovered during the process " of design and manufacture." Let us see whether this is true. In speaking of the defect in the brake the court found that it " *could not be discovered without a practical* " *test on the defendant's railroad track or over like track*," and that it " *was only discoverable when put into use on* " *defendant's track or similar track.*" (P. 35.)

We respectfully submit, in view of this language, that the court did find, in the most emphatic way, that the defect could not have been discovered during the process of design and manufacture.

Defendant's counsel concede the correctness of the decision in Railway Company *v.* Gordon (151 U. S. 285), because the inspection made by the purchaser's superintendent enabled it "to have the same opportunity as the "builders themselves of acquiring a knowledge of the "material, work, design, strength, and capacity for the "purpose intended." Under the finding made by the court below, defendant's superintendent had exactly the same opportunity as the plaintiff's engineer of discovering the defect in the brake which only developed by a test upon the line. If defendant's superintendent had been at plaintiff's works during the entire period of construction he could have found out nothing more about the defect in the brake than he ascertained when he inspected it in its completed state.

Defendant's counsel ask why the plaintiff could "no "more ascertain in the process of manufacture the defect "in these cars than could the defendant on inspection"? We answer, because of the finding of the court below as to the nature of the defect.

But if the plaintiff could have ascertained the defect in the process of manufacture, so could defendant's superintendent when he came to make his inspection, because the defect did not consist in bad material or in poor workmanship, but in the operation and application of the brake; and these were all disclosed to the view of defendant's inspector to exactly the same extent as they were to the plaintiff's engineer.

In answer to the contention of the defendant's counsel that the rule in regard to the right to return property after

inspection is different in cases of implied warranty from what it is in cases of express warranty, we beg leave to refer, in addition to the cases cited in our original brief, to the case of Fairbank Canning Company *v.* Metzger, 43 Hun. 71. This was an action brought to recover the purchase price of certain beef where the defendant sought to recoup damages for breach of warranty of quality. The court laid down the following rules:

"If an express warranty is not a part of the contract "of sale, the purchaser may decline to receive the prop- "erty when offered for delivery, if, after reasonable op- "portunity for examination, he finds it was not such as "was contracted for.

"The acceptance and use of the property in the last "case is an admission that the contract has been complied "with, and no action can thereafter be maintained against "the vendor for defects *existing at the time of the delivery* "*or discovered afterwards.*"

Defendant's counsel say that in the case of Heilbutt *v.* Hickson (L. R. 7, C. P. 438) all of the judges agreed that the plaintiffs had a right to recover their damages, but concede that, in the opinion of the majority of the court, the right to rescind the contract was based upon a subsequent modification, for which the jury found there was a consideration. The right to recover damages, however, was given by the court not on account of the existence of an implied warranty of fitness, but because the shoes were not equal to the sample which was exhibited at the time they were ordered. Bovil, C. J., says:

"Upon the matters left to the jury, they found that the "shoes delivered, and also those that were ready for "delivery, were not equal to the sample."

Defendant's counsel claim the right to rescind on the

ground that it was a *condition* of the contract that the cars should be in all respects fit for operation upon its Twelfth-street line, and that this condition survived inspection and acceptance at the plaintiff's works and gave defendant a right to rescind after an actual trial upon its line. This contention is answered by the following passages from the opinion in the Heilbutt *v.* Hickson case:

"In cases where the thing sold is not specific, and "the property has not passed by the sale, the vendee "may refuse to receive the thing proffered in per- "formance of the contract, on the ground that it does "not correspond with the descriptive statement, or, in "other words, that the condition expressed in the "contract has not been performed; still, if he receive "the thing' sold, and has the enjoyment of it, he "cannot afterwards treat the descriptive statement "as a condition, but only as an agreement, for a breach "of which he may bring an action to recover damages. "And in the last edition (1871) of the notes of Williams' "Saunders (vol. I, p. 554) the result of several of the "cases is thus stated by the learned editor: 'When it ap- "'pears that the consideration has been executed in part, "'that which was before a warranty or condition prece- "'dent loses the character of a condition, or, to speak "'more properly, ceases to be available as a condition, "'and becomes a warranty in the narrower sense of the "'word, viz: a stipulation by way of agreement, for the "'breach of which a compensation must be sought in "'damages.'"

Defendant's counsel ask why it was the duty of the defendant to undertake the expense and risk of applying the Laclede brakes to the plaintiff's cars. We answer, because if it had any recourse against the plaintiff, which we deny, its measure of damages, as declared by the case of Stillwell Manufacturing Company *v.* Phelps (130 U. S. 520) was the cost of remedying any defects in the cars

so as to make them as good as the contract required; and as the Laclede cars of a similar character were operated upon the same line by a brake of a different pattern costing from $75 to $100 apiece, the application of that brake would have made the cars entirely up to contract. It is undeniably true that when a party who is entitled to the benefit of a contract can save himself from a serious loss arising from a breach of it by reasonable exertions, he will not be permitted to charge the delinquent with damages which arise in consequence of his own inactivity.

Warren *v.* Stoddart, 105 U. S. 229.

Defendant's counsel call attention to an omission of a paragraph in the opinion in the Stillwell case, which it inserts on page 17 of its additional brief. That paragraph was omitted advisedly in the quotation from the opinion made on pages 71-2 of our original brief, in order to bring into juxtaposition the two parts of the opinion, one of which stated the doctrine contended for by the plaintiff, and the other of which stated the reason why that doctrine did not apply to the case under consideration. The omitted paragraph did not hold that the doctrine as contended for by plaintiff was not the law, but only that it did not apply to the case in hand. In that case a notice very similar to that contained in the letter of April 11, 1888, from defendant's president to plaintiff's general manager (p. 32) was given by the defendant to the manufacturing company. It reads as follows:

"If your clients do not within ten days proceed to put "the mill in repair, so that it will do good work, Mr. "Phelps will employ the best millwrights he can obtain "and put the mill in order, and charge the expense to "your clients."

The court below instructed the jury as follows:

"If the plaintiff broke this contract by failing to fur-
" nish the defendant such a mill as it was bound to fur-
" nish, then the defendant had the right to give the plain-
" tiff notice that it was required to remedy the defects,
" and on its failure to do so the defendant could then
" proceed and correct the defects himself, so that the mill
" should be such as he was entitled to have under the con-
" tract, and charge the reasonable and necessary expenses
" of the work to the plaintiff."

This court affirmed the judgment of the court below.

Defendant's counsel, on page 19 of their additional brief, use the following language:

"Nor does the fact that during the time of plaintiff's
" promises to repair the defects, and while the cars were
" being so tested, passengers were received thereon and
" fares collected from them, change or affect the right of
" the defendant to reject and return the cars. It was, at
" the most, only a circumstance tending to show that the
" defendants had assumed the ownership of the cars, the
" effect of which was conclusively negatived by the other
" features of the case above stated."

This is not a correct statement of the law. The carriage of passengers upon the cars and the collection of fares from them constituted a use of the cars by the defendant for its own purposes, and was not only a circumstance tending to show that the defendant had assumed the ownership of the cars, but is conclusive of such fact, for in the language of Benjamin in his work on Sales, "Re-
" ceipt will become acceptance *if any act be done by the*
" *buyer which he would have no right to do were he not the*
" *owner of the goods.*"

This court has also said, in regard to a contract of sale, that "the purchaser who has received and used the arti-

" cle, and derived a benefit from it, cannot then rescind " the contract."

Lyon *v.* Bertram, 20 How. 149.

Defendant's counsel say that no exception was filed by plaintiff to the finding of facts by the court below, upon the ground that the court had failed to find upon the claim for extra items. This was not necessary. The findings of fact must be complete upon all the issues raised by the pleadings, or a reversal is inevitable. Plaintiff did ask, however, a finding upon these extras, as will appear on page 209 of the record, and did ask specific declarations of law in regard to each extra item, as shown by declarations 8, 9, 10, 11, 12, and 13, on pages 210, 211, 212 of the record. It likewise requested the court to change its statement of the general instruction for the contract price of the cars with interest asked by the plaintiff, and refused to the statement that specific declarations were asked and refused (p. 217). And one of the assignments of error reads as follows:

" The circuit court erred in not entering judgment for " plaintiff for the contract price of the cars, for the extras " ordered by defendant, and for interest."

X.

In the event of reversal, under the doctrine laid down in the case of Ft. Scott *v.* Hickman (112 U. S. 150), the court should remand the case to the circuit court with directions to enter judgment for the purchase price of the cars, with interest, and to add thereto the amount claimed for the extra items, if established by the proof.

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